No. 06-1164

Title: John R. Sand & Gravel Company, Petitioner

v.

United States

Docketed: February 26, 2007

Lower Ct: United States Court of Appeals for the Federal Circuit

Case Nos.: (05-5033)

Decision Date: August 9, 2006

Rehearing Denied: November 30, 2006

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Feb 26 2007	Petition for a writ of certiorari filed. (Response due March 28, 2007)
Mar 28 2007	Order extending time to file response to petition to and including April 27, 2007.
Apr 27 2007	Brief of respondent United States in opposition filed.
May 8 2007	DISTRIBUTED for Conference of May 24, 2007.
May 8 2007	Reply of petitioner John R. Sand & Gravel Company filed. (Distributed)
May 29 2007	Petition GRANTED limited to Question 1 presented by the petition.
Jun 27 2007	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 3, 2007.
Aug 3 2007	Brief amicus curiae of National Association of Home Builders filed.
Aug 3 2007	Joint appendix filed.
Aug 3 2007	Brief of petitioner John R. Sand & Gravel Company filed.
Aug 3 2007	Brief amicus curiae of Pacific Legal Foundation filed.
Aug 10 2007	The time within which to file the respondent's brief on the merits is extended to and including September 28, 2007.
Aug 30 2007	SET FOR ARGUMENT Monday, November 6, 2007.
Sep 6 2007	Record received from USCA for Federal Circuit. (1 box containing 1-binder, 1-argument tape and 1 set of pleadings)
Sep 20 2007	CIRCULATED.
Sep 21 2007	Record received from U.S. Court of Federal Claims. (2 boxes)
Sep 28 2007	Brief of respondent United States filed. (Distributed)
Sep 28 2007	Brief amicus curiae of Metamora Group filed. (Distributed)
Oct 26 2007	Reply of petitioner John R. Sand & Gravel Company filed. (Distributed)
Nov 6 2007	Argued. For petitioner: Jeffrey K. Haynes, Bloomfield Hills, Mich. For respondent: Malcolm L. Stewart, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
FILED

061164 FEB 26 2007

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY, PETITIONER

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The statute of limitations in the Tucker Act, 28 U.S.C. §2501, provides: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The questions presented are:

1. Whether the statute of limitations in the Tucker Act limits the subject matter jurisdiction of the Court of Federal Claims.

2. Whether a claim for a permanent physical taking of a portion of real property first accrues upon the government's temporary exclusion of the property holder from another portion of the property.

RULE 29.6

Petitioner has no parent company. No publicly held company owns 10% or more of petitioner's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 10

CONCLUSION 23

APPENDIX

Circuit Court Opinion 1a

Court of Federal Claims Opinion (10/29/04) 41a

Court of Federal Claims Opinion & Order (6/27/03) 125a

Order Denying Rehearing 155a

Exhibit A 157a

Joint Trial Exhibit 45 (partial) 158a

TABLE OF AUTHORITIES

Page

CASES

Arbaugh v. Y & H Corp., 546 U.S. 500 (2006) 14

Ariadne Financial Services Party, Ltd. v. United States, 133 F.3d 874 (Fed. Cir. 1998) 16

Bolduc v. United States, 72 Fed. Cl. 187 (2006) 19

Boos v. Runyon, 201 F.3d 178 (2d Cir. 2000) 18

Bray v. United States, 785 F.2d 989 (Fed. Cir. 1986) 16

Chaney v. United States, ___ Fed. Cl. ___, 2007 U.S. Claims Lexis 23 (Feb. 2, 2007) 20

Chung v. United States Dep't of Justice, 333 F.3d 273 (D.C. Cir. 2003) 18

Day v. McDonough, 547 U.S. ___ (April 25, 2006) 15

DeArnaud v. United States, 151 U.S. 483 (1894) 12

Eberhart v. United States, 546 U.S. 12 (2005) 14, 15

Fadem v. United States, 52 F.3d 202 (9th Cir. 1995) 18

Finn v. United States, 123 U.S. 227 (1887) 12

Franconia Associates v. United States, 536 U.S. 129 (2002) 12, 23

Frey v. Environmental Protection Agency, 270 F.3d 1129 (7th Cir. 2001) 18

Glarner v. United States, 30 F.3d 697 (6th Cir. 1994) 18

Grass Valley Terrace v. United States, 69 Fed. Cl. 341 (2005) 19

Hedges v. United States, 404 F.3d 744 (3d Cir. 2005) 18

Hendler v. United State, 952 F.2d 1364 (Fed. Cir. 1991) 21

Henke v. United States, 60 F.3d 795 (Fed. Cir. 1995) 16

Hopland Band of Pomo Indians v. United States, 855 F.2d 1573 (Fed. Cir. 1988) 16

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) 12, 13

John R. Sand & Gravel Co. v. United States, 457 F.3d 1345 (Fed. Cir. 2006) 1

John R. Sand & Gravel Co. v. United States, 62 Fed. Cl. 556 (Fed. Cir. 2004) 1, 3

John R. Sand & Gravel Co. v. United States, 57 Fed. Cl. 182 (Fed. Cir. 2003) 1, 2

Kendall v. United States, 107 U.S. 123 (1883) 11

Kontrick v. Ryan, 40 U.S. 443 (2004) 8, 13, 14

Kosmo v. United States, 72 Fed. Cl. 46 (2006) 19

Laber v. Harvey, 438 F.3d 404 (4th Cir. 2006) 18

Lambert v. United States, 44 F.3d 296 (5th Cir. 1995) 18

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 6, 20, 23

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 7

Martinez v. United States, 333 F.3d 1295 (Fed. Cir. 2003) 17

Mitchell v. Maurer, 293 U.S. 237 (1934) 8

Montoya v. Chao, 296 F.3d 952 (10th Cir. 2002) 18

Oropallo v. United States, 994 F.2d 25 (1st Cir. 1993) 18

Sandvik v. United States, 177 F.3d 1269 (11th Cir. 1999) 18

Scarborough v. Principi, 541 U.S. 401 (2004) 14

Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573 (Fed. Cir. 1993) 16, 21

Soriano v. United States, 352 U.S. 270 (1957) 12

Stone Container Corp. v. United States, 229 F.3d 1345 (Fed. Cir. 2000) 15

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) 7

T.L. v. United States, 443 F.3d 956 (8th Cir. 2006) 18

United States v. Locke, 471 U.S. 84 (1985) 16

United States v. New York, 160 U.S. 598 (1896) 12

United States v. Pewee Coal Co., 341 U.S. 114 (1951) 23

United States v. Sherwood, 312 U.S. 584 (1941) 12

United States v. Wardwell, 172 U.S. 48 (1898) 12

Venture Coal Sales Co. v. United States, 370 F.3d 1102 (Fed. Cir. 2004) 17

Wood-Ivey Systems Corp. v. United States, 4 F.3d 961 (Fed. Cir. 1993) 15, 16

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 15

CONSTITUTION

U.S. Const. Amend. V 1

STATUTES

28 U.S.C. §1254(1) 1

28 U.S.C. §1491(a)(1) 2

28 U.S.C. §2244(d) 15

28 U.S.C. §2501 ..... 2, 8, 11

42 U.S.C. §9601 3

OTHER AUTHORITIES

Note, *Developments in the Law – Statutes of Limitations* 63 Harv. L. Rev. 1177 (1950) 14

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is reported at 457 F.3d 1345 and is reprinted in the Appendix. App. 1a-40a, 157a. The opinion of the Court of Federal Claims after trial is reported at 62 Fed. Cl. 556 and is reprinted in the Appendix. App. 41a-126a. The opinion of the Court of Federal Claims denying in part the government's motion for judgment on the pleadings is reported at 57 Fed. Cl. 182 and is reprinted in the Appendix. App. 127a-154a.

JURISDICTION

The court of appeals' judgment was entered on August 9, 2006. Petitioner's timely petition for rehearing was denied on November 30, 2006. App. 155a-156a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

The Tucker Act provides in relevant part:

> "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or

any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. §1491(a)(1).

"Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. §2501.

STATEMENT

This case raises the important, unsettled and recurring question of whether older decisions of this Court holding that the Tucker Act's statute of limitations is jurisdictional remain good law in light of this Court's recent cases holding that statutes of limitation generally do not affect subject matter jurisdiction in the absence of a clear Congressional statement. This question has plagued the Federal Circuit for more than twenty years. This case also raises the important and unsettled question of whether a claim for a permanent taking of a portion of real property first accrues from the date of the government's earlier temporary invasion of another portion of the property.

I. Statement of Facts.

The Federal Circuit found to be undisputed the pertinent facts set forth in the Court of Federal Claim's decision on the government's motion for judgment on the pleadings, 57 Fed. Cl. 182 (App. 127a-155a), and

decision after trial, 62 Fed. Cl. 556 (App. 41a-126a). App. 2a, 15a.

A. John R. Sand's Leasehold.

Petitioner John R. Sand & Gravel Company ("John R. Sand") leased 158 acres in Metamora Township, Lapeer County, Michigan, in 1969 for a term of 50 years. App. 128a. The lease entitles John R. Sand to exclusive use of the property for mining and removing marketable stone and sand. App. 53a. John R. Sand's sand and gravel production facilities, including buildings, a crushing and wash plant, and a water supply well and pond (the "Plant Area"), are located in the center of its rectangular leasehold. A contaminated landfill known as the Metamora Landfill is located in the northern portion of the leasehold. App. 128a. John R. Sand's Plant Area is not in the landfill area. See figure attached to the Federal Circuit's decision ("February 1994 Fence Alignment"), App. 157a.

B. EPA's Early Activities.

In 1984, the United States Environmental Protection Agency ("EPA") placed the landfill on its National Priority List of hazardous waste sites pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 *et seq.* ("CERCLA"). App. 128a. In 1986, EPA issued a record of decision ("ROD") setting forth remedial action plans concerning portions of the landfill. App. 128a. By 1989, EPA had installed monitoring wells in the landfill area. App. 128a. In 1990, EPA issued a second ROD that called for a cap over the

landfill and other actions. The 1990 ROD did not describe the metes and bounds of the landfill cap, did not indicate when construction of the cap would begin, and did not exclude John R. Sand from any portion of its leasehold. App. 129a.

C. Early EPA Fences.

EPA erected fences in John R. Sand's Plant Area in 1992-1993 that temporarily prevented John R. Sand from operating its machinery and selling finished products to customers. App. 129a. Following John R. Sand's protests, EPA relocated the fences outside the Plant Area and John R. Sand continued its mining and gravel operations. App. 130a. In February 1994, EPA installed another fence in the Plant Area that temporarily deprived John R. Sand of access to its water supply well next to its supply pond, but EPA removed this fence in the summer of 1994 and John R. Sand continuously used the area thereafter. App. 130a. The 1994 fence alignment is shown on the February 1994 Fence Alignment, App. 157a.

D. Administrative Order.

On December 18, 1996, EPA issued an Administrative Order to John R. Sand that required John R. Sand to provide entry and access to EPA and its representatives to all portions of John R. Sand's leasehold. EPA asserted that access was necessary to complete remedial actions for the landfill pursuant to a 1993 consent decree between EPA and a group of defendants ("Settling Defendants"). App. 130a-131a, 153a n. 6. The Administrative Order defined by metes and bounds an "Area of Institutional Controls"

containing the landfill cap system. The landfill cap system consists of a cap extending to the edge of the waste, a stormwater retention pond not within the cap, a security fence, a landfill gas venting system, and implementation of deed restrictions. The Area of Institutional Controls is the cross-hatched area shown on Exhibit C to the Administrative Order, Joint Trial Exhibit 45. App 158a. The Area of Institutional Controls includes an area larger than the landfill cap and its boundary was not fenced in 1994. App. 157a.

Following disputes between John R. Sand and EPA concerning EPA's access to the landfill site, the District Court for the Eastern District of Michigan issued an order granting the government and its representatives access to the landfill site and authorizing relocation of the perimeter fence. App. 119a n.7, App. 132a. The fence, begun on April 27 and completed on May 12, 1998, enclosed about 42 acres of John R. Sand's leasehold and completely excluded John R. Sand only from the Area of Institutional Controls. App. 132a.

John R. Sand filed its complaint for a permanent physical taking of the portion of its leasehold enclosed within the Area of Institutional Controls on May 20, 2002. App. 132a.

II. Proceedings in the Court of Federal Claims: Motion for Judgment on the Pleadings.

The government moved for judgment on the pleadings (which the Court of Federal Claims treated as a motion for summary judgment because the parties included materials outside the pleadings), arguing that the Tucker Act's six-year statute of limitations barred John R. Sand's claim. App. 132a, 134a. The

government argued that EPA's activities since 1992, including occupation, removal of hazardous materials, and installation of wells and original fencing, were the events that fixed the government's liability. App. 135a.

Except as to the monitoring wells, the court found that the government did not demonstrate that John R. Sand's property was "clearly and permanently" taken in 1992 to cause a physical taking. App. 141a. The court found that the government failed to demonstrate that it destroyed John R. Sand's right to posses, use or dispose of its property within the rule for a permanent physical taking set forth in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), in the Area of Institutional Controls by constructing the 1992-1993 fences. App. 142a. The court found that John R. Sand had the right to possess and in fact made extensive and valuable use of the portion of its leasehold that later became the Area of Institutional Controls by mining the area until EPA issued the December 1996 administrative order. App. 142a. As to the monitoring wells, the court found that John R. Sand's claim as to the area occupied by the wells was barred, but the extent of the taking for the individual wells did not "bootstrap" to become a permanent physical taking of the entire Area of Institutional Controls. App. 143a. The court did not decide exactly when John R. Sand's claim first accrued, whether December 1996 or May 1998. App. 150a.

III. Proceedings in the Court of Federal Claims: Trial.

After trial on liability, the Court of Federal Claims determined, among other things, the accrual date of John R. Sand's claim. App. 50a-52a. The court

noted that John R. Sand and the government agreed that John R. Sand's claim accrued in May 1998. The court found as a matter of law that John R. Sand's taking claim accrued in May 1998 when the government's agents completed the fence that "permanently and absolutely excluded" John R. Sand from the Area of Institutional Controls, citing the parties' stipulated facts. App. 52a.

On the merits, the court held that John R. Sand's physical taking claim was non-compensable under equitable principles of "justice and fairness" set forth in regulatory takings cases, in part because John R. Sand allowed the continuation of landfilling activities on its leasehold after its lease began in 1969. App. 72a-73a. The court further held that a 1995 Michigan statute, enacted 26 years after John R. Sand's valid 1969 lease, operated as a background principle of nuisance law pursuant to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). App. 81a. Noting that no Michigan case supported the result, the court held that the government could abate John R. Sand's continued mining in the Area of Institutional Controls as an anticipatory nuisance by permanent physical occupation of the Area of Institutional Controls. App. 111a-112a.[1]

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[1] The Court of Federal Claims decision after trial is arguably contrary to *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002) (It is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." (footnote omitted)), and *Lucas*, 505 U.S. at 1029 ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."). The Federal Circuit did not address the trial court's

IV. Proceedings in the Federal Circuit.

In a split decision, the Federal Circuit vacated and remanded for dismissal, but did not address the merits. Over a vigorous dissent, the panel majority held 28 U.S.C. §2501 to be jurisdictional, determined that the government's construction of the 1994 fence caused John R. Sand's permanent physical taking claim to first accrue, and held that John R. Sand's complaint filed in 2002 was time-barred.

The panel majority would not have addressed the accrual of John R. Sand's claim but for the majority's view that the statute of limitations is jurisdictional and can be addressed *sua sponte* by the court.[2] The government did not appeal the Court of Federal Claims' rejection of the government's argument that the statute of limitations barred John R. Sand's claim. App. 13a. The government agreed with John R. Sand that John R. Sand's taking claim accrued upon construction of the fence around the Area of Institutional Controls in May 1998, and therefore 28 U.S.C. §2501 did not bar John R. Sand's claim. App. 14a. The panel majority addressed the jurisdictional issue at the invitation of an amicus, the Metamora Group (the Settling Defendants who signed the consent decree with EPA). App. 13a-14a, 31a n. 9.

The panel majority recognized that this Court's recent jurisprudence, beginning with *Kontrick v. Ryan*, 540 U.S. 443 (2004), considers statutes of limitations

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decision on the merits, App. 28a, and the merits are not the subject of this petition.

[2] Every federal appellate court must satisfy itself of its own jurisdiction and that of the lower courts in a claim under review. *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). See App. 15a. This principle is not at issue in this petition.

and other "claim-processing" rules as non-jurisdictional, but distinguished §2501:

> [S]ection 2501 sets forth a condition that must be met for a waiver of sovereign immunity in a suit for money damages against the United States. We have continued to hold that section 2501 creates a jurisdictional prerequisite even after the Supreme Court decided *Kontrick* and its progeny.

App. 18a. The panel majority concluded:

> We recognize the Supreme Court's recent jurisprudence concerning claim-processing rules, but do not think that section 2501 falls within that category. Therefore, we are unwilling to disturb the well-settled law that section 2501 creates a jurisdictional condition precedent for suit in the Court of Federal Claims, which may not be waived by the parties.

App. 19a.

The panel majority further held that John R. Sand's claim for a permanent physical taking accrued upon construction of the February 1994 fence because "EPA's presence destroyed JRS&G's right to exclude others." App. 24a.

The dissent argued that this Court's recent statute of limitations jurisprudence applies to §2501 and that "it is incorrect to accord unique status to §2501 and hold that it is a limit on 'jurisdiction'." App. 34a-36a. As to the panel majority's "permanence" analysis, the dissent argued that the majority's position "brings serious imprecision to takings law." The dissent argued

that John R. Sand's claim for a permanent taking of the Area of Institutional Controls should not have accrued based on construction of fences in a separate area of the leasehold and when the fences were later removed, restoring the area to use by John R. Sand. App. 39a.

The Federal Circuit denied John R. Sand's petition for rehearing *en banc* on November 30, 2006. App. 155a-156a.

REASONS FOR GRANTING THE PETITION

The petition for certiorari should be granted to clarify the important, unsettled and continuing issues of (1) whether the Tucker Act's statute of limitations constitutes a clear Congressional statement of a limit on the subject matter jurisdiction of the Court of Federal Claims, and (2) whether a claim for a permanent physical taking of a portion of real property first accrues upon the government's temporary exclusion of the property owner from another portion of the property.

The jurisdictional issue is important because it applies to all claimants against the government, including taking claimants such as John R. Sand. This issue requires resolution by this Court to settle whether this Court's recent statute of limitations cases overrule this Court's older cases that hold the Tucker Act's statute of limitations to be jurisdictional. The issue is continuing because not only has it divided decisions in the Federal Circuit for twenty years, but it has produced contradictory decisions in the Court of Federal Claims.

The test for when a permanent taking first accrues is important because the Federal Circuit's decision injects significant ambiguity into the test for

determining when a permanent taking first accrues. The test adopted by the Federal Circuit would allow the government to argue that a taking claim is barred based upon government conduct on any portion of property that occurred years or decades in the past. Such a test would cause needless litigation and disputes about claim accrual matters that are typically obvious.

I. The Federal Circuit Exempted the Tucker Act From This Court's Recent Statute of Limitations Jurisprudence.

A. The Federal Circuit's Decision Identifies a Conflict Between Older and More Recent Decisions of This Court.

In holding that the six-year statute of limitations in the Tucker Act, 28 U.S.C. §2501, is jurisdictional, the Federal Circuit panel majority expressly relied on this Court's 19th-century cases beginning with *Kendall v. United States*, 107 U.S. 123 (1883). In *Kendall*, this Court said:

> We said in *McElrath v. United States*, 102 U.S. 426, that the government could not be sued except with its consent, and that it may restrict the jurisdiction of the Court of Claims to certain classes of demands. . . . To that class may be referred claims which are declared barred if not asserted within the time limited by the statute.

107 U.S. at 123. The panel majority cited (App. 19a) several other 19th-century cases to support its view, including *Finn v. United States*, 123 U.S. 227, 232-233

(1887) ("The general rule that limitation does not operate by its own force as a bar, but is a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions, has no application to suits in the court of claims against the United States."), *DeArnaud v. United States*, 151 U.S. 483, 495-496 (1894) (same, quoting *Finn*), *United States v. New York*, 160 U.S. 598, 616-619 (1896) (dicta, quoting *Finn*), and *United States v. Wardwell*, 172 U.S. 48, 52 (1898) ("Section 1069, Rev. St., is not merely a statute of limitations, but also jurisdictional in its nature, and limiting the cases of which the court of claims can take cognizance" citing *Finn*).

In *Soriano v. United States*, 352 U.S. 270, 271 (1957), this Court relied on *Kendall* to hold that the Court of Claims lacked jurisdiction over a claim not filed within the Tucker Act's six-year limitations period. The basis for the holding in *Soriano* was the doctrine that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Id.* at 276, citing *United States v. Sherwood*, 312 U.S. 584, 590-91 (1941).

This strict application of the "limitations and conditions" of a waiver of sovereign immunity was loosened in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990), in which this Court recognized that limitations principles should generally apply to the government "in the same way" they apply to private parties. It is arguable, but not settled, that *Irwin* overruled *Soriano*. See *Irwin*, 498 U.S. at 98-99 (White, J., concurring); dissent below, App. 36a. This strict application of the doctrine of conditions on waivers of sovereign immunity was further loosened in *Franconia Associates v. United States*, 536 U.S. 129, 145 (2002)

("the text of §2501 is unexceptional" and does not create a special accrual rule in suits against the government).

Yet the Federal Circuit panel majority did not discuss the application of either *Irwin* or *Franconia Associates* to the jurisdictional nature of §2501. App. 34a-35a. Under *Irwin*, the question implicated by the Federal Circuit's decision is whether construing §2501 as non-jurisdictional "amounts to little, if any, broadening of the congressional waiver" and "is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." 498 U.S. at 95.

B. The Federal Circuit's Decision Conflicts with Claim-Processing Decisions of This Court.

The Federal Circuit panel majority rejected as inapplicable to §2501 this Court's recent claim-processing cases because the panel majority did not "think that section 2501 falls within that category." App. 19a. As argued by the dissent, App. 37a-38a, the panel majority's reasoning conflicts with this Court's concerted effort to clarify the relation between statutes of limitation and subject matter jurisdiction beginning with *Kontrick v. Ryan*, 540 U.S. 443 (2004):

> Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

* * *

> Characteristically, a court's subject-matter jurisdiction cannot be expanded to account for the party's litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point.

540 U.S. at 455, 456.

Kontrick's admonition was repeated in *Scarborough v. Principi*, 541 U.S. 401, 414 (2004) (Equal Access to Justice Act fee-processing procedure is not "jurisdictional"); see also *id.* at 421 (applying *Irwin* and *Franconia*[3]), and *Eberhart v. United States*, 546 U.S. 12, ___ (Oct. 31, 2005) (slip op. at 4) ("our most recent decisions have attempted to brush away confusion" concerning non-jurisdictional claim-processing rules).

This Court has cautioned against "profligate" use of the term "jurisdiction" and that "time prescriptions, however emphatic, 'are not properly typed jurisdictional'". *Arbaugh v. Y & H Corp.*, 546 U.S. 500, ___ (Feb. 22, 2006) (slip op. at 8) (Title VII definition of "employer" not jurisdictional, but relates to the merits). Most recently, this Court has stated that a "statute of limitations defense . . . is not

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[3] Even if the modest broadening of the waiver of sovereign immunity in *Irwin* is limited to a "readily identifiable private-litigation equivalent," see *Scarborough*, 541 U.S. at 427 (Thomas, J., dissenting), takings claims for damages are equivalent to private actions for damages resulting from trespass to real property. See Note, *Developments in the Law – Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1197 (1950).

'jurisdictional'". *Day v. McDonough*, 547 U.S. ___, ___ (Apr. 25, 2006) (slip op. at 5) (construing one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §2244(d)); see also Scalia, J., dissenting ("We have repeatedly stated that the enactment of time-limitation periods such as that in §2244(d), without further elaboration, produces defenses that are non-jurisdictional and thus subject to waiver and forfeiture", citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), *Eberhart* and *Kontrick*) (dissent slip op. at 2-3).

C. The Federal Circuit's Decision Continues Intra-Circuit Conflict Over Whether §2501 is Jurisdictional.

For twenty years, the Federal Circuit has steered an unsteady course over the jurisdictional nature of §2501. This Court should resolve this intra-circuit conflict because the Federal Circuit is the only circuit that will address this issue. This conflict now manifests itself in contradictory decisions in the Court of Federal Claims that thwart uniform treatment of Tucker Act claimants.

By not evaluating the effect of *Irwin* and *Franconia Associates* on *Soriano*, the Federal Circuit's decision conflicts with prior decisions of the Federal Circuit. *Stone Container Corp. v. United States*, 229 F.3d 1345, 1352-1353 (Fed. Cir. 2000)(*Irwin* overruled *Soriano*); *Wood-Ivey Systems Corp. v. United States*, 4 F.3d 961, 964 n.4 (Fed. Cir. 1993("The Supreme Court considers [*Soriano*] to be obsolete if not overturned"); see also Plager, J., concurring ("Since *Irwin*, compliance with statutory time limits is no longer jurisdictional, in

the old sense that when a Congressionally specified time limit had expired a court had no power to entertain the case."). 4 F.3d at 964 n.3.

The Federal Circuit has long struggled with the "jurisdictional" nature of §2501. The struggle began with *Bray v. United States*, 785 F.2d 989, 992 (Fed. Cir. 1986) ("over the years, the term 'jurisdiction' has been batted about like a bird caught in a badminton game"; subject matter jurisdiction distinguished from the exercise of such jurisdiction). Next, the case upon which the panel majority relies, *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988), relied on *Soriano* to find that §2501 is a jurisdictional limitation rather than an affirmative defense. See App. 16a, 35a-36a (dissent). A later decision of the Federal Circuit noted the confusion in this area. *Henke v. United States*, 60 F.3d 795, 998-999 (Fed. Cir. 1995) ("[T]he Government neglects to point out that the question of statutory time bars and sovereign immunity is no longer amenable to bright-line rules and that the historic role of strict construction of sovereign immunity has been thrown into considerable question by recent Supreme Court decisions", citing *United States v. Locke*, 471 U.S. 84 (1985)[4] and *Irwin*. See also *Ariadne Financial Services Party, Ltd. v. United States*, 133 F.3d 874, 878 (Fed. Cir. 1998) ("as a threshold matter, this statutory language [in §2501] confirms that the question of a time

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[4] "Statutory filing deadlines are generally subject to the defenses of waiver, estoppel and equitable tolling. Whether this general principle applies to deadlines that run in favor of the Government is a question on which we express no opinion today." 471 U.S. at 94 n. 10 (citation omitted).

bar on Ariadne's claim does not affect the subject matter jurisdiction of the Court of Federal Claims").

The panel majority relies on an *en banc* decision of the Federal Circuit, *Martinez v. United States*, 333 F.3d 1295 (Fed. Cir. 2003), which cited the "well established" rule that statutes of limitations for claims against the government are jurisdictional in nature. *Id.* at 1316. The court, however, noted that exceptions to limitations periods, such as equitable tolling, turn on Congressional intent, citing *Irwin*. *Id.* That view is consistent with *Arbaugh*, slip op. at 14, ("But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character."). *Martinez* seems not to have bound later panels of the Federal Circuit. See *Venture Coal Sales Co. v. United States*, 370 F.3d 1102, 1105 n. 2 (Fed. Cir. 2004) ("The most precise ground for the trial court's decision here therefore would seem to be that Venture Coal failed to make its claim within the required limitations period – that is not a question of subject matter jurisdiction of the court.").

D. The Federal Circuit's Decision Conflicts in Principle With Decisions From Other Circuits.

The Federal Circuit panel majority's cramped view of §2501 in light of *Irwin* conflicts in principle with the holdings of all but one of the other circuits. Eleven out of 12 other circuits have construed *Irwin* to mean that compliance with a statute of limitations generally is not a jurisdictional prerequisite to suing the government in the absence of a clear Congressional statement. See *Oropallo v. United States*, 994 F.2d 25,

29 n.4 (1st Cir. 1993) (recognizing that *Irwin* "overruled or made irrelevant" *Soriano*); *Boos v. Runyon*, 201 F.3d 178, 183 (2d Cir. 2000) (temporal prerequisites to suit are not jurisdictional); *Hedges v. United States*, 404 F.3d 744, 749 (3d Cir. 2005) (*Irwin* holds that mandatory language of §2501 is subject to equitable tolling and therefore not jurisdictional); *Laber v. Harvey*, 438 F.3d 404, 429 (4th Cir. 2006) (time limits subject to equitable tolling are not jurisdictional); *Lambert v. United States*, 44 F.3d 296, 298 (5th Cir. 1995) (*Irwin* "overturned the established precedent of many circuits" that statutory time limits in suits against the government are jurisdictional); *Glarner v. United States*, 30 F.3d 697, 701 (6th Cir. 1994) (Federal Tort Claims Act statute of limitations is not jurisdictional); *Frey v. Environmental Protection Agency*, 270 F.3d 1129, 1135 (7th Cir. 2001) ("failure to comply with statutory limits on a waiver of sovereign immunity is not jurisdictional"); *Fadem v. United States*, 52 F.3d 202, 206 (9th Cir. 1995) (*Irwin* held that "statutory time limits on suits against the government are *not* jurisdictional in nature" (emphasis in original)); *Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002) (*Irwin* construed "unequivocally mandatory language" of §2501 as subject to equitable tolling and therefore not jurisdictional); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) ("garden-variety statute of limitations" is not jurisdictional); *Chung v. United States Dep't of Justice*, 333 F.3d 273, 277-78 (D.C. Cir. 2003) (an "ordinary statute of limitations" is not jurisdictional). Only the Eighth Circuit holds that *Irwin* does not announce a general rule that a statute of limitations is not jurisdictional. *T.L. v. United States*, 443 F.3d 956, 961 (8th Cir. 2006) ("the statute of

limitations" in the Federal Tort Claims Act "defines the court's jurisdiction").

E. The Jurisdictional Question Concerning §2501 Has Caused Continuing Conflict in the Court of Federal Claims.

The intra-circuit conflict and confusion in the Federal Circuit concerning the jurisdictional nature of §2501 has caused the Court of Federal Claims to diverge in opposite directions. Two Court of Federal Claims decisions issued on the same day two weeks before the Federal Circuit's decision below illustrate this divergence. In *Kosmo v. United States*, 72 Fed. Cl. 46 (2006), the court held that §2501 is jurisdictional. In *Bolduc v. United States*, 72 Fed. Cl. 187 (2006), the court exhaustively explored the issue and determined that the better-reasoned authority holds that §2501 is not jurisdictional.

In *Bolduc*, the court considered the practical effect of the jurisdictional question: "The label under which a dismissal motion is considered can be significant to the outcome of that motion – as plaintiffs have the burden of demonstrating subject-matter jurisdiction while the defendant has the burden where a motion for failure to state a claim is filed." *Id.* at 192 (citations and internal quotations omitted). *Bolduc* relied on *Grass Valley Terrace v. United States*, 69 Fed. Cl. 341, 345-49 (2005) (on remand from this Court's decision in *Franconia Associates*), which reconciled the Federal Circuit's "inconsistent" decisions to conclude that the Federal Circuit decisions that have "closely examined" the issue support a plain-language interpretation that §2501 is not jurisdictional. Most

recently, the Court of Federal Claims found the reasoning in *Grass Valley Terrace* "compelling" but, believing itself bound by the Federal Circuit's decision below, found that §2501 is jurisdictional. *Chaney v. United States*, ___ Fed. Cl. ___, ___ (2007 U.S. Claims Lexis 23, *14 n.7 (slip op. at 6 n.7) (Feb. 2, 2007).

II. The Federal Circuit's Decision Causes "Serious Imprecision" in Takings Law.

The Federal Circuit's decision establishes a peculiar rule, unsupported by this Court's decisions, that a property owner's claim for a permanent physical taking "first accrues" when the government places (but later removes) a substantial structure (a fence) on one portion of private property that is different from another portion of the property that the government later permanently occupies. As noted by the dissent below, the "serious imprecision" of this peculiar rule threatens to throw into disarray what should be a straightforward analysis of physical takings claims.

A. The Federal Circuit's Decision Blurs the Straightforward Notion of Permanent Physical Taking.

It has been settled since *Loretto* that a permanent physical occupation of real property constitutes a taking whereas a temporary physical invasion is not a taking. Physical occupations are distinguishable from "temporary limitations on the right to exclude" by their "permanence and absolute exclusivity." 458 U.S. at 436 n.12.

After *Loretto*, this Court has not had occasion to address the "permanent" and "occupation" elements of

Loretto, except to note that the fact of a physical taking is "typically obvious and undisputed." *Tahoe-Sierra*, 535 U.S. at 322 n.17. Yet, the Federal Circuit panel majority held that "'permanent' has a special meaning in the determination of whether a physical occupation has occurred." App. 22a. The "special meaning" of permanence adopted by the Federal Circuit results in a rule that government "presence", App. 26a, on any portion of property causes a taking claim to accrue for permanent government occupation of any other portion of the property.

The Federal Circuit's unusual formulation of "permanence" results from its misapplication of several Federal Circuit decisions that, without guidance from this Court, have blurred the notion of permanent occupation. First, in *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), the court, in evaluating the permanence of 100-foot deep, concrete-encased steel groundwater monitoring wells, said: "When the government intrusion is as substantial a physical occupancy of private property as this is, *Loretto* establishes that there is a taking." *Id.* at 1377. The Federal Circuit panel majority misquoted this language in *Hendler* to hold that government occupation is permanent when the government's "intrusion is a substantial physical occupancy of private property." App. 22a. This misquotation significantly misconstrues *Hendler*.

A later decision of the Federal Circuit, construing *Hendler*, determined that a permanent physical occupation involves a "substantial physical interference with property rights." *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1583 (Fed. Cir. 1993), cited by the panel majority, App. 22a. The panel majority then inflates the government's "presence" by

virtue of the fences erected in 1994 in John R. Sand's Plant Area as destroying John R. Sand's "right to exclude others from its leasehold." App. 24a. This "presence of a permanent nature", the panel majority reasoned, caused John R. Sand's permanent taking claim to accrue in 1994. App. 26a.

The Federal Circuit's analysis overlooks several key facts found by the Court of Federal Claims, and not found clearly erroneous by the Federal Circuit, that are consistent with a "typically obvious" permanent occupation. See dissent, App. 39a-40a. First, the February 1994 fence was in John R. Sand's Plant Area, and did not enclose the Area of Institutional Controls that the government agreed at trial was permanently taken in 1998. App. 130a. Second, EPA removed this fence in the summer of 1994. Third, as the government stipulated, the government "permanently and exclusively occupied the Area of Institutional Controls in May 1998." App. 51a-52a.

B. The "Springing" Accrual Rule of the Federal Circuit Will Distort the Accrual Test in §2501.

The rule gleaned from the Federal Circuit's decision appears to be that if the government installs objects on some "portion" of private property, App. 24a, the property owner's taking claim accrues for the government's later permanent occupation of *any other* portion of the property. The Federal Circuit's test will allow the government to argue that its occupation of one portion of property "springs" to any other portion of the property whenever the government finds it useful to raise the statute of limitations.

The proposed "springing" rule threatens to collapse distinctions between temporary and permanent takings. Temporary takings are analyzed where the government's occupation is for a limited time. *United States v. Pewee Coal Co.*, 341 U.S. 114, 119 (1951) (Reed, J., concurring: "Many properties . . . may be subjected to public operation only for a short period of time to meet war or emergency needs, and can then be returned to their owners."). Yet the return of property to the property owner is inconsistent with the elements of a permanent taking: the government deprives the property owner of the rights to possess, use and dispose of the property. *Loretto*, 458 U.S. at 435-436.

The Federal Circuit's proposed "springing" accrual rule threatens to create a special accrual rule under §2501. Property holders would now have to bring a defensive claim for a permanent taking based upon government invasion of the property, no matter how transient the invasion, for fear that a claim for any later permanent occupation by the government would be time-barred. This Court rejected the effect of such a special accrual rule for §2501 in *Franconia Associates*, 536 U.S. at 147 ("The Government would thus find itself defending against highly speculative damage claims in a profusion of lawsuits").

CONCLUSION

The petition for certiorari should be granted.

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05-5033

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOHN R. SAND & GRAVEL COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

August 9, 2006, Decided

COUNSEL: Jeffrey K. Haynes, Beier Howlett, P.C., of Bloomfield Hills, Michigan, argued for plaintiff-appellant. With him on the brief was L. Rider Brice, III.

Aaron P. Avila, Attorney, Environment & Natural Resources Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Kelly A. Johnson, Acting Assistant Attorney General; and Susan V. Cook,John S. Most, Steven D. Bryant, and Kathryn E. Kovacs, Attorneys.

Steven C. Nadeau, Honigman Miller Schwartz and Cohn LLP, of Detroit, Michigan, for amici curiae Brunswick Corporation, et al. With him on the brief were Robert M. Jackson; and Robert K. Huffman, Miller & Chevalier Chartered, of Washington, DC.

JUDGES: Before NEWMAN, LOURIE, and SCHALL, Circuit Judges. Opinion for the court filed by Circuit Judge SCHALL. Dissenting opinion filed by Circuit Judge NEWMAN.

SCHALL, Circuit Judge.

John R. Sand and Gravel Company ("JRS&G") appeals the final decision of the United States Court of Federal Claims, following a trial, that the United States was not liable to JRS&G under the Fifth Amendment to the Constitution for the alleged taking of JRS&G's leasehold interest in a 158-acre tract of land in Lapeer County, Michigan. *John R. Sand & Gravel Co. v. United States*, 62 Fed. Cl. 556 (2004) ("*Sand & Gravel III*"). Because we conclude that JRS&G did not file its complaint within the six-year limitations period of 28 U.S.C. § 2501, we hold that the Court of Federal Claims lacked jurisdiction. We therefore vacate the Court of Federal Claims's decision and remand the case to the court with the instruction that it dismiss JRS&G's complaint.

BACKGROUND

I.

The pertinent facts, which are not in dispute, are set forth in *John R. Sand & Gravel Co. v. United States*, 57 Fed. Cl. 182 (2003) ("*Sand & Gravel I*"), and *Sand & Gravel III*, 62 Fed. Cl. 556.

In 1969, JRS&G leased a 158-acre tract of land in Metamora Township, Lapeer County, Michigan, from Russell and Mildred Parrish ("Parrish property") for a

term of fifty years. *Sand & Gravel III*, 62 Fed. Cl. at 558. Pursuant to the lease, JRS&G is entitled to the exclusive use of the property for the purpose of mining sand and gravel. *Id.* at 564.[1]

The Parrish property consists of a rectangular area. *Sand & Gravel I*, 57 Fed. Cl. at 183 n.3. JRS&G's operations are principally located in its plant area in the east-central portion of the property. JRS&G's plant area contains several buildings, a supply pond, and customer access roads. *Id.* JRS&G's main sand and gravel pit ("main pit") is just southeast of the plant area. *Id.* A landfill is located to the north of JRS&G's plant area. *Id.* The landfill is known as the Metamora Landfill. The features just described, as well as others, are shown on the map of the Parrish property that is titled "February 1994 Fence Alignment Metamora Landfill Site." The map is included with this opinion as Appendix A.

The Area of Institutional Controls ("AIC") comprises a 42-acre portion of the property to the north of JRS&G's plant area. It encompasses the entirety of the landfill and some of the property surrounding the landfill wherein the landfill cap system is located.[2] *Id.* at 185. The northern and eastern boundaries of the AIC run along the Parrish property lines. To the west, the AIC boundary runs just outside the edge of a gravel road. To the south, the AIC is located to the north of JRS&G's siltation pond. The southern border of the AIC then cuts to the south to encompass the Stormwater Retention Pond.

At the time JRS&G signed the lease in 1969, the landfill was already operating on the northern portion of the

Parrish property. *Sand & Gravel III*, 62 Fed. Cl. at 560. The Parrishes continued to operate the landfill during the first eleven years of JRS&G's leasehold until it closed in 1980. *Id.* at 559-60. During its years of operation, the landfill illegally accepted solid and liquid industrial waste in 55-gallon drums. Tens of thousands of such drums are currently buried on the site. *Id.* at 570.

In 1984, the landfill was placed on the National Priorities List pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675 (2000), due to the large number of drums containing hazardous waste that had been buried there. See *Sand & Gravel III*, 62 Fed. Cl. at 559. Pursuant to CERCLA, the Environmental Protection Agency ("EPA") issued its first Record of Decision ("ROD") in 1986.[3] *Sand & Gravel I*, 57 Fed. Cl. at 183. In the 1986 ROD, the EPA stated that remedial action for the Metamora Landfill would consist of excavating the buried drums of hazardous waste for incineration off-site. The ROD estimated that the excavation would take six to eight months to complete. Pursuant to the 1986 ROD, the EPA not only excavated drums, but also took soil samples, installed groundwater monitoring wells, and constructed a storage pad[4] east of JRS&G's plant area. *Id.*

In 1990, the EPA issued a second ROD. *Sand & Gravel III*, 62 Fed. Cl. at 559. In the 1990 ROD, the EPA stipulated additional remedies selected for the containment of the Metamora Landfill and for treatment of the groundwater at the site. *Id.* at 559-60. These remedies included installing a landfill cap system

to prevent further contamination of aquifers by the wastes dumped in the Metamora Landfill and a fence around the landfill to restrict access to the site. *Id.* at 560. The 1990 ROD also contemplated the continued incineration of excavated drums off-site under the 1986 ROD. The 1990 ROD did not provide a metes and bounds description of the landfill cap and fence or indicate when construction would begin. *Sand & Gravel I*, 57 Fed. Cl. 182 at 183.

Pursuant to the the 1990 ROD, the EPA erected a chain link fence on JRS&G's leasehold during the winter of 1992-1993. *Id.* at 184. The fence enclosed approximately 60% of the Parrish property, including the entirety of the present AIC, JRS&G's plant area, and JRS&G's main pit. *Id.* at 184 & n.5. The fence was six feet tall and anchored by posts set 48 inches into the ground. Concrete secured the terminal, corner, and gate posts. The fence was topped with three strands of barbed wire and accompanied by EPA warning and no trespassing signs.

The fence prevented JRS&G from accessing its operations, prompting protests from the company. *Id.* Following these protests, the EPA allowed JRS&G to access its plant area and relocated the fence. *Id.* The record reveals that the relocated fence still encompassed the AIC.

In February of 1994, the EPA constructed a new internal security fence that cut off JRS&G's access to parts of its plant area. *Id.* at 184. The area that was fenced off as of February of 1994 is designated on the map at Appendix A as February 1994 Fence Alignment. As can be seen, as of February of 1994,

fencing encompassed the overwhelming portion of JRS&G's leasehold interest.[5] The internal security fence that concerned JRS&G in 1994 is contained within the larger fenced area and cut through JRS&G's plant area in the east-central portion of the property. This fence was relocated later in 1994 to allow JRS&G access to its plant area under the condition that JRS&G not intrude into the area enclosed by the internal security fence. *Id.* The internal security fence was moved again in 1996 and in May of 1998. The AIC remained fenced off each time the internal security fence was moved. However, JRS&G continued to mine sand and gravel in parts of the AIC as late as 1996. *Sand & Gravel I*, 57 Fed. Cl. at 189.

During the 1990s, JRS&G and the EPA disagreed on numerous issues. Counsel for JRS&G wrote a series of letters from 1992-1994 asserting JRS&G's property rights and entitlement to just compensation. *Id.* at 184. In addition to the letters, JRS&G repeatedly physically interfered with the EPA's operations.[6] As a result of the disputes between JRS&G and the EPA, on December 18, 1996, the EPA issued an Administrative Order requiring JRS&G to cooperate with the EPA. *Id.* The Administrative Order defined the metes and bounds of the AIC and forbade JRS&G from mining within the AIC. *Id.* at 185. The order also forbade JRS&G from further interference with the EPA and threatened a fine of $ 25,000 per day of noncompliance with the order. *Id.* Disputes arose regarding JRS&G's compliance with the Administrative Order, and on March 23, 1998, the United States District Court for the Eastern District of Michigan entered an order enjoining JRS&G from further interference with the EPA's remedial efforts. *Id.* Shortly after the issuance of the

district court's order, the fence was realigned. This fence realignment was complete in May of 1998. *Id.*

II.

On May 20, 2002, JRS&G filed suit in the Court of Federal Claims. In its complaint, JRS&G alleged that the EPA's construction of the landfill cap, occupation of the AIC, construction of fences and access roads, and installation of groundwater monitoring wells amounted to a permanent physical taking. Compl. at 4-5, 9-11. JRS&G also alleged that the court orders created an easement appurtenant for access by the EPA and were thus a physical taking by the EPA. *Id.* at 11-13.

In due course, the government moved for dismissal of the complaint for lack of jurisdiction on the ground that JRS&G's suit was untimely.[7] The government argued that JRS&G's suit was time-barred because it was filed after the running of the six-year limitations period of 28 U.S.C. § 2501. *Sand & Gravel I*, 57 Fed. Cl. at 186. According to the government, JRS&G's claim accrued in December of 1992, when the government physically occupied the property, installed monitoring wells, and fenced off parts of the Parrish property. *Id.* On July 27, 2003, the Court of Federal Claims denied the government's motion with respect to most of the Parrish property that was allegedly taken because it concluded that the government had not met its burden of showing that there was no genuine issue of material fact as to whether the government had "clearly and permanently" taken the property in 1992. *Id.* at 189. The alleged taking in 1992 was not permanent, the court found, because (i) JRS&G was allowed access to the property after protesting the construction of the

fence, (ii) it continued to mine sand and gravel on the property, including the AIC, between 1991 and 1996, and (iii) it was allowed to tour the landfill, which was within the AIC. *Id.* The court acknowledged that JRS&G had been deprived of the right to exclude others from the Parrish property in 1992. However, it determined that the government presence on the property was not sufficiently permanent and exclusive to comprise a physical taking until at least late 1996, when the Administrative Order was issued. *Id.* The Court of Federal Claims also rejected the government's argument that because JRS&G knew it had a potential takings claim as early as 1992-1994, the claim had accrued. *Id.* at 190-93. Instead, the court found that JRS&G did not know or have reason to know of the accrual of its claim under *United States v. Dickinson*, 331 U.S. 745, 67 S. Ct. 1382, 91 L. Ed. 1789 (1947), because the situation on the Parrish property did not stabilize until 1996 when the EPA issued the Administrative Order, defining the metes and bounds of the AIC and barring JRS&G from entry. *Sand & Gravel II*, 57 Fed. Cl. at 192-93. The court declined to pinpoint when the claim accrued, but found that the government had failed to meet its burden on summary judgment of demonstrating that there was no genuine issue of material fact as to whether the claim accrued more than six years prior to May 20, 2002, when JRS&G filed its complaint. *Id.* at 193. Accordingly, the court denied the government's motion to dismiss with respect to most of the property that allegedly had been taken. *Id.*

The Court of Federal Claims, however, did grant the government's motion to dismiss insofar as it related to JRS&G's claim with respect to the monitoring wells

placed on the property in March of 1989. *Id.* at 183, 189. Under *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991), the court found that the wells were sufficiently permanent to comprise a physical taking upon their installation. *Sand & Gravel I*, 57 Fed. Cl. at 189. Because the wells were installed over six years before JRS&G filed its complaint, the court granted summary judgment based on the statute of limitations with regard to the wells.[8] *Id.* at 193.

Subsequently, the parties cross-moved for summary judgment on liability. On April 2, 2004, the Court of Federal Claims granted in part the government's motion for summary judgment and denied JRS&G's motion for partial summary judgment. *John R. Sand & Gravel v. United States*, 60 Fed. Cl. 230 (2004) ("*Sand & Gravel II*"). The court agreed with the government's contention that background principles of Michigan nuisance and property law limit the scope of compensable property interests in a physical takings case such as JRS&G's. *Id.* at 239. The court then set forth three steps for determining whether background principles of Michigan nuisance and property law limited the use of JRS&G's leasehold: (i) JRS&G had to demonstrate possession of a property interest; (ii) the government had to identify background principles of Michigan law prohibiting certain uses of the property; and (iii) the government had to connect those background principles to the facts to show that the use of the property intended by JRS&G was barred by applicable Michigan law. *Id.* at 240. The court found that JRS&G had demonstrated its possession of a property interest and that the government had identified applicable principles of Michigan nuisance and property law. *Id.* at 242-51. However, the court

denied the government's motion for summary judgment without prejudice because it found that the government had not sufficiently demonstrated the existence of each of the alleged nuisances at the site. *Id.* at 243, 245, 247-51.

After a bench trial, the Court of Federal Claims issued an opinion on October 29, 2004, finding that the government's actions had not taken JRS&G's property. *Sand & Gravel III*, 62 Fed. Cl. at 589. The Court of Federal Claims revisited the question of when JRS&G's takings claim accrued. *Id.* at 562-63. The court found that JRS&G's claim accrued when the government first permanently and exclusively occupied JRS&G's property. *Id.* at 563. The court determined that this occurred in May of 1998, when the government completed its relocation of the perimeter fence around the AIC. *Id.* The court found that the claim had not accrued prior to May of 1998 because ongoing access disputes between the government and JRS&G precluded the government from permanently and exclusively occupying the property. *Id.*

After setting the date of accrual as May of 1998, the Court of Federal Claims addressed the merits of JRS&G's takings claim. The court noted that JRS&G, as the plaintiff, bore the burden of demonstrating a legally-cognizable property interest under the framework set out in *Sand & Gravel II*. *Id.* at 562. The court found that JRS&G had not met this burden because JRS&G had taken its lease to the Parrish property subject to the landfill. *Id.* at 568, 570. The court noted that JRS&G knew about the landfill when it signed the lease and had allowed the landfill to operate despite its right to prohibit the landfill's operations

under the terms of the lease. *Id.* The court charged JRS&G with "knowledge of, acquiescence in, and cooperation with" the Parrishes' landfill operation. *Id.* at 570. "[F]airness and justice," the court concluded, required JRS&G, as a party participating in the illegal landfill operation, to bear the burden of the cleanup in the form of the EPA's presence on the property. *Id.* at 572 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960)). Therefore, the court denied JRS&G's takings claims on the merits.

The court continued that it was, "in the interest of judicial economy and efficiency" to elucidate a second reason why JRS&G could not recover for a physical taking. *Id.* The court found that continued mining in the AIC would contravene remediation efforts, pollute groundwater, and risk fires from methane. *Id.* at 579-88. Under Michigan law, the court found that activities resulting in these risks are prohibited. *Id.* at 589. Thus, under the framework set forth in *Sand & Gravel II*, the court found that background principles of Michigan law, including both Michigan's Natural Resources and Environmental Protection Act, Mich. Comp. Laws §§ 324.20101-.20142 (2006), and Michigan general nuisance law, allowed the EPA to enter the property to prevent JRS&G from using the property in a way that would result in these nuisances. *Sand & Gravel III*, 62 Fed. Cl. at 589.

JRS&G appeals from the decision of the Court of Federal Claims granting judgment in favor of the government. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

I.

On appeal, JRS&G argues that the Court of Federal Claims erred when it found that JRS&G's takings claim failed because JRS&G had taken its lease subject to a pre-existing landfill. JRS&G also argues that the principles of "fairness and justice" relied upon by the Court of Federal Claims in its resolution of this issue apply only in regulatory takings cases--not in physical takings cases like JRS&G's. Likewise, JRS&G argues that the Court of Federal Claims's alternative rationale was incorrect because background principles of nuisance and property law only limit property interests for the purpose of regulatory takings.

The government responds that the Court of Federal Claims did not err in concluding that JRS&G's takings claim failed because JRS&G took the lease for the Parrish property subject to the landfill. Based on principles of "fairness and justice," the government contends that the court properly found that the cooperation between the Parrishes' landfill operation and JRS&G barred JRS&G from recovering for a taking. With regard to the court's alternative rationale based on nuisance law, the government argues that background principles of nuisance and property law, as articulated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992), properly apply in physical takings cases. The government urges that the Court of Federal Claims properly applied Michigan's background principles of nuisance and property law and thus correctly found that JRS&G's takings claim was barred under this theory. On appeal, the government does not challenge the decision of the Court of Federal Claims in

Sand & Gravel I rejecting its argument that the court lacked jurisdiction because JRS&G's claim was time-barred.

Although the government does not raise a jurisdictional challenge on appeal, an amicus, the Metamora Group, does.[9] The Metamora Group argues that the Court of Federal Claims erred in exercising jurisdiction over JRS&G's claim because the claim was barred by the six-year statute of limitations set forth in 28 U.S.C. § 2501. In order for a takings claim to accrue and therefore begin the running of the statute of limitations, the Metamora Group contends, the government's occupation need not have been exclusive. Instead, the amicus argues that a property owner's right to exclude others is the focus of determining when a takings claim accrues. Thus, the amicus argues that the claim accrued over six years prior to the filing of JRS&G's complaint in 1989, when the EPA constructed the storage pad on the Parrish property and began removing drums. Alternatively, the Metamora Group argues that the claim accrued in 1992, when the government constructed a fence barring others from the site, or in 1994, when the government constructed the internal security fence that interfered with JRS&G's operations. By 1994, the amicus argues, the government had declared itself a co-tenant of the property and thus JRS&G's claim had accrued. The amicus argues that to the extent that JRS&G mined within the AIC in 1996 or entered the area enclosed by the fence, it was without the government's permission and did not alter the date of accrual. The Metamora Group contends that by 1994 the government's construction of fences was sufficiently permanent in nature to cause a physical takings claim to accrue.

Finally, the Metamora Group states that the court erred in relying on Dickinson v. United States in its ruling in *Sand & Gravel I* that JRS&G's claim did not stabilize until within six years of the filing of JRS&G's complaint because Dickinson is only applicable in cases where slow natural processes, such as flooding, are involved.

JRS&G responds in its reply brief that its takings claim accrued when the government realigned the fence encompassing the AIC in May of 1998. JRS&G contends that the Court of Federal Claims properly found that the fences constructed in 1992-1993 and 1994 did not permanently interfere with JRS&G's leasehold and that therefore no takings claim accrued at those times. JRS&G argues that the March 1998 district court order granted the government the undisputed authority to control JRS&G's leasehold property for the first time. Prior to this time, JRS&G asserts, the government's actions were unauthorized and therefore no takings claim accrued. JRS&G attacks the amicus's argument that the 1992-1993 and 1994 fences were sufficiently permanent to form the basis for a takings claim by noting that these fences were removed and therefore cannot form the basis for a permanent takings claim. At oral argument, counsel for the government agreed with JRS&G that its takings claim accrued in May of 1998 and that therefore the statute of limitations, 28 U.S.C. § 2501, did not bar JRS&G's claim.

For the reasons set forth below, we agree with the amicus that JRS&G's suit in the Court of Federal Claims was time-barred and that, therefore, the court lacked jurisdiction. Accordingly, we vacate the court's

decision and remand the case to the court with the instruction that it dismiss JRS&G's complaint.

II.

A.

As an appellate court, we must be satisfied that the court whose opinion is the subject of our review properly exercised jurisdiction, regardless of whether the parties challenge the lower court's jurisdiction. *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S. Ct. 162, 79 L. Ed. 338 (1934) ("An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review."); *Consolidation Coal Co. v. United States*, 351 F.3d 1374, 1378 (Fed. Cir. 2003) ("[U]nder federal rules any court at any stage in the proceedings may address jurisdictional issues. Thus, even if the issue is not properly raised, this court sua sponte may consider all bases for the trial court's jurisdiction."). We review the Court of Federal Claims findings of fact for clear error and its legal rulings without deference. *Banks v. United States*, 314 F.3d 1304, 1307 (Fed. Cir. 2003). Accordingly, we review the trial court's findings of fact relating to jurisdictional issues for clear error. *Id.* at 1308 (stating that the Court of Federal Claims's "jurisdictional findings of fact are reviewed for clear error"). In this case, the pertinent jurisdictional facts are not in dispute. The Court of Federal Claims's jurisdiction is a question of law which we review de novo. *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000) ("A determination of the Court of Federal Claims' jurisdiction presents a question of law that we review de novo.").

The Tucker Act, 28 U.S.C. § 1491(a)(1), provides the Court of Federal Claims with jurisdiction over takings claims brought against the United States. *Morris v. United States*, 392 F.3d 1372, 1375 (Fed. Cir. 2004). Pursuant to 28 U.S.C. § 2501, claims brought in the Court of Federal Claims under the Tucker Act are "barred unless the petition thereon is filed within six years after such claim first accrues." The six-year statute of limitations set forth in section 2501 is a jurisdictional requirement for a suit in the Court of Federal Claims. *Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (en banc) ("It is well established that statutes of limitations for causes of action against the United States, being conditions of the waiver of sovereign immunity, are jurisdictional in nature."); *Frazer v. United States*, 288 F.3d 1347, 1351 (Fed. Cir. 2002) ("Section 2501 constitutes a jurisdictional limit on the authority of the Court of Federal Claims."); *Caguas Cent. Fed. Sav. Bank v. United States*, 215 F.3d 1304, 1310 (Fed. Cir. 2000) ("In the Court of Federal Claims, the statute of limitations is jurisdictional, because filing within the six-year period was a condition of the waiver of sovereign immunity in the Tucker Act, 28 U.S.C. § 1491(a)(1)."); *Seldovia Native Ass'n v. United States*, 144 F.3d 769, 774 (Fed. Cir. 1998); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988). Due to the jurisdictional nature of section 2501 it may not be waived. *Hopland Band of Pomo Indians*, 855 F.2d at 1577 ("[S]ince the 6-year limitations period of section 2501, serves as a jurisdictional limitation rather than simply as an affirmative defense, such statutes of limitations have been held as not capable of waiver or subject to an estoppel, whether pled or not.") (internal quotation marks omitted).

The dissenting opinion cites several recent Supreme Court decisions in support of the proposition that the statute of limitations set forth at section 2501 is not jurisdictional, including *Day v. McDonough*, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006), *Eberhart v. United States*, 546 U.S. 12, 126 S. Ct. 403, 163 L. Ed. 2d 14 (2005)(per curiam), *Scarborough v. Principi*, 541 U.S. 401, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004), and *Kontrick v. Ryan*, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004). None of the foregoing decisions address section 2501. *Day*, 126 S. Ct. at 1681 (holding that that the one-year statute of limitations for filing a habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 is not jurisdictional); *Arbaugh*, 126 S. Ct. at 1245 (addressing whether the numerosity requirement of 42 U.S.C. § 2000e(b) is jurisdictional); *Eberhart*, 126 S. Ct. at 405 (finding that the seven-day time limit for filing a motion for a new trial under Federal Rules of Criminal Procedure 33(b)(2) and 45(b)(2) is not jurisdictional); *Scarborough*, 541 U.S. at 414 (finding that the thirty-day time limit for filing a claim for fees under 28 U.S.C. § 2412(d)(1)(B) is not jurisdictional); *Kontrick*, 540 U.S. at 456 (holding that a time limit for filing a complaint as a creditor in bankruptcy proceedings is not jurisdictional). Instead, the statutes at issue involved minor procedural requirements and time limits that the Court characterized as non-jurisdictional "claim-processing rules." E.g., *Kontrick*, 540 U.S. at 456. Day is the only case involving a statute of limitations. However, that case did not involve a suit against the United States for money damages. In contrast to a non-jurisdictional claim-processing rule or the statute of limitations in Day, section 2501 sets forth a condition

that must be met for a waiver of sovereign immunity in a suit for money damages against the United States.

We have continued to hold that section 2501 creates a jurisdictional prerequisite even after the Supreme Court decided Kontrick and its progeny. See, e.g., *MacLean v. United States*, 454 F.3d 1334, 2006 U.S. App. LEXIS 17352, _ F.3d _ , No. 05-5149, 2006 WL 1897047, at *3 (Fed. Cir. July 12, 2006) ("In the Court of Federal Claims, the statute of limitations 'is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed.'" (quoting *Hopland*, 855 F.2d at 1576-77)); *Goodrich v. United States*, 434 F.3d 1329, 1331, 1336 (Fed. Cir. 2006) (affirming the Court of Federal Claims's decision dismissing Goodrich's takings claim for lack of jurisdiction under section 2501 (citing *Goodrich v. United States*, 63 Fed. Cl. 477, 481 (2005))); *Ind. Mich. Power Co. v. United States*, 422 F.3d 1369, 1378 (Fed. Cir. 2005) ("The statute of limitations is jurisdictional in nature and, as an express limitation on the waiver of sovereign immunity, may not be waived.") (citation omitted).

Further, the six-year statute of limitations of section 2501 enjoys a longstanding pedigree as a jurisdictional requirement. Since 1883 when the Court first held that the statute of limitations was jurisdictional in *Kendall v. United States*, 107 U.S. 123, 125, 2 S. Ct. 277, 27 L. Ed. 437, 18 Ct. Cl. 758 (1883), the Court has consistently maintained that the time limit is jurisdictional and therefore cannot be waived. *United States v. Wardwell*, 172 U.S. 48, 52, 19 S. Ct. 86, 43 L. Ed. 360, 34 Ct. Cl. 535 (1898) ("[Section 2501's predecessor] is not merely a

statute of limitations but also jurisdictional in its nature, and limiting the cases of which the Court of Claims can take cognizance."); see also *United States v. New York*, 160 U.S. 598, 619, 16 S. Ct. 402, 40 L. Ed. 551, 31 Ct. Cl. 459 (1896); *Austin v. UnitedStates*, 155 U.S. 417, 427, 15 S. Ct. 167, 39 L. Ed. 206, 30 Ct. Cl. 484 (1894); *De Arnaud v. United States*, 151 U.S. 483, 495-96, 14 S. Ct. 374, 38 L. Ed. 244, 29 Ct. Cl. 555(1894); *Finn v. United States*, 123 U.S. 227, 232, 233, 8 S. Ct. 82, 31 L. Ed. 128, 23 Ct. Cl. 486 (1894); *Rice v. United States*, 122 U.S. 611, 618-19, 7 S. Ct. 1377, 30 L. Ed. 793 (1887). We recognize the Supreme Court's recent jurisprudence concerning claim-processing rules, but do not think that section 2501 falls in that category. Therefore, we are unwilling to disturb the well-settled law that section 2501 creates a jurisdictional condition precedent for suit in the Court of Federal Claims, which may not be waived by the parties. See, e.g., *De Arnaud*, 151 U.S. at 495-96 ("'The general rule that limitation does not operate by its own force as a bar, but is a defen[s]e, and that the party making such a defen[s]e must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defen[s]e, either expressly or by failing to plead the statute, but the government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by the statute upon suits against the United States in the Court of Claims.'" (quoting *Finn*, 123 U.S. at 232, 233)).

A takings claim accrues "'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" *Goodrich*, 434 F.3d at 1333 (quoting *Hopland*, 855 F.2d at 1577); see also *Bowen v. United States*, 292 F.3d 1383, 1385

(Fed. Cir. 2002). In addition, the claim only accrues if the plaintiff knew or should have known of the existence of the events fixing the government's liability. *Goodrich*, 434 F.3d at 1333; *Hopland*, 855 F.2d at 1577; *Kinsey v. United States*, 852 F.2d 556, 557 n.* (Fed. Cir. 1988).

B.

The question we must decide then is when JRS&G's takings claim accrued. The Court of Federal Claims held that the claim accrued in May of 1998 when the government relocated the fence around the AIC. We conclude, however, that the claim accrued not later than February of 1994 when the government constructed the fence that cut off JRS&G's access to its plant area. That date was more than six years before JRS&G filed its complaint on May 20, 2002.

The Fifth Amendment provides,"[N]or shall private property be taken for public use without just compensation." U.S. Const. amend. V. Property rights in a physical thing consist of a bundle of rights, including the rights to possess, to use, and to dispose of the physical thing. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78, 65 S. Ct. 357, 89 L. Ed. 311 (1945) (finding that property rights "denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it").

The right to exclude others is "one of the most treasured strands in an owner's bundle of property rights." *Loretto*, 458 U.S. at 435; see also *Nollan v. Cal.*

Coastal Comm'n, 483 U.S. 825, 831, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) (noting that the right to exclude others is one of the most essential sticks in the bundle of property rights); *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979) (characterizing the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property"); *Hendler*, 952 F.2d at 1374 (stating that "[i]n the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession-the right to exclude strangers, or for that matter friends, but especially the Government"). When the government permanently and physically occupies property, it effectively destroys the owner's right to exclude, as well as the owner's right to make non-possessory use of the property. *Loretto*, 458 U.S. at 435-36. Due to the importance of a property owner's right to exclude, we have held that "[t]he Government does not have the right to declare itself a co-tenant-in-possession with a property owner." *Hendler*, 952 F.2d at 1374; see also *Kaiser Aetna*, 444 U.S. at 179-80 (holding that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation"). Thus, a permanent physical occupation by the government is a per se physical taking requiring compensation under the Fifth Amendment because it destroys, among other rights, a property owner's right to exclude. *Loretto*, 458 U.S. at 441; *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002) ("[A] permanent physical occupation of property, no matter how slight, is a per se taking."); *Hendler*, 952 F.2d at 1375 ("A physical occupation of private property by the government which is adjudged to be of a

permanent nature is a taking, and that is true without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.").

"A physical occupation . . . is a permanent and exclusive occupation by the government that destroys the owner's right to possession, use, and disposal of . . . property." *Boise Cascade Corp.*, 296 F.3d at 1353. Thus, physical occupation by the government only comprises a taking when that occupation is "permanent." *Id.*; *Boling v. UnitedStates*, 220 F.3d 1365, 1370 (Fed. Cir. 2000); *Hendler*, 952 F.2d at 1375. "Permanent" has a special meaning in the determination of whether a physical occupation has occurred. See *Hendler*, 952 F.2d at 1376. In the context of physical takings "'permanent' does not mean forever, or anything like it." *Id.* A government occupation is "permanent" when the government's "intrusion is a substantial physical occupancy of private property." *Id.* at 1377. The government's occupation may be permanent even if it is not "exclusive, or continuous and uninterrupted." *Id.*; see also *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1582 (Fed. Cir. 1993) ("[A] permanent physical occupation need not be continuous and uninterrupted. An intermittent intrusion still causes a taking.")(citations omitted). The Supreme Court held inLoretto that the placement of cable and connection boxes on the plaintiff's property was a physical taking. 458 U.S. at 441. In Hendler, we held that the placement of groundwater monitoring wells on the plaintiff's property and the government's periodic presence for installing and servicing the wells was "permanent" and therefore a physical taking. 952 F.2d at 1377. In contrast, we noted that a transient and relatively

inconsequential incursion by the government, such as a truckdriver parking on a vacant lotto eat lunch, is not sufficiently permanent to comprise a taking. *Id.* at 1376-77. Similarly, in Boise Cascade, we determined that government surveyors who briefly entered the plaintiff's land over a period of five months to perform owl surveys did not "permanently" occupy the plaintiff's property. 296 F.3d at 1356. Thus, the determination of whether government occupancy is "permanent" is highly fact-specific. In any event, the installation of fixed physical structures, such as the cable and cable connections in Loretto or the groundwater monitoring wells in Hendler is typical of a "permanent" occupation, while the transient entry of persons via government authority on a plaintiff's property is generally not "permanent."

C.

We hold that JRS&G's takings claim accrued not later than February of 1994 upon the completion of the 1994 fence. The 1994 security fence ran across JRS&G's plant area, cutting off JRS&G's access to its pond and stockpile areas. *Sand & Gravel I*, 57 Fed. Cl. at 184. The six-foot fences, with posts that were anchored by concrete in some instances, comprised just the sort of permanent structure have been found to form the basis for a physical takings claim. See *Loretto*, 458 U.S. at 422 (finding cables attached by screws and nails and a box attached by bolts to be sufficiently permanent to comprise a physical taking); see also *Hendler*, 952 F.2d at 1376 (finding that groundwater monitoring wells were permanent in nature given their structure). Thus, the EPA took possession of the property at least as of

1994 when it erected permanent structures to bar JRS&G from portions of the Parrish property.[10]

The EPA's presence destroyed JRS&G's right to exclude others from its leasehold, one of the most treasured rights of property owners. See *Kaiser Aetna*, 444 U.S. at 176. Further, the EPA's 1994 fence also inhibited JRS&G's right to use its property free of interference. In fact, the firm conducting the remediation efforts stated that the removal of the offending portions of the 1994 fence "will be contingent upon John R's agreement to stay out of the new security area." Pl.'s Mem. In Opp'n to Def.'s Mot. for J. on the Pleadings, Exh. 10 (Jan.23, 2003). Thus, the EPA and its agents placed conditions on the use of JRS&G's property in exchange for relocating the fence - destroying the use strand in JRS&G's bundle of property rights in addition to JRS&G's right to exclude. Based on the foregoing, we find that, not later than 1994, the EPA had effectively declared itself a co-tenant in possession of a portion of the property and that accordingly, JRS&G's takings claim accrued at that time.

Although we acknowledge that the EPA relocated portions of the fence in 1994 to accommodate JRS&G's need for access to its plant area, we note that the fence remained on the property and that the EPA continued to carry on its remediation activities on the leasehold. The net effect of the restructuring of the fence in 1994 was to reduce the area around the landfill enclosed by fencing - the government did not remove the fence entirely. The EPA's willingness to alter the parameters of the fence does not change the fact that the fence itself was permanent in nature. The fact that JRS&G

interfered with the EPA's efforts and ignored the fence until ordered in 1998 by the United States District Court for the Eastern District of Michigan to cooperate with the EPA, does not alter our conclusion. Likewise, we find that a physical occupation of the fenced area occurred despiteJ RS&G's continued and permitted use of the area not enclosed by the 1994 fence. See *Loretto*, 458 U.S. at 430 (finding that a permanent physical occupation is a taking even if the government "occup[ies] only relatively insubstantial amounts of space and do[es] not seriously interfere with the landowners use of the rest of his land").

We find unpersuasive the Court of Federal Claims's reliance in *Sand & Gravel I* on *767 Third Avenue Associates v. United States*, 48 F.3d 1575 (Fed. Cir. 1995). In *767 Third Avenue Associates*, the plaintiff was a landlord who leased three properties to offices of the Socialist Federal Republic of Yugoslavia. *Id.* at 1576. In response to political unrest in Yugoslavia, the United States government ordered closure of the operations of the three tenants. *Id.* at 1577. After the three tenants left, agents of the Department of the Treasury inspected the plaintiff's premises and posted a notice on the door of each office stating that it was "CLOSED BY ORDER OF THE UNITED STATES DEPARTMENT OF THE TREASURY" and that "NO ACCESS TO THESE PREMISES IS PERMITTED." We held that there was no per se physical taking because "the government did not physically occupy the premises at 767 Third Avenue." *Id.* at 1583. We noted that the notices were up for less than three months, that the locks were not changed, that nothing physical was attached to the premises except for the notices, and that no guards were placed at the door. *Id.* Further, the

landlord was allowed access on request. *Id.* The Court of Federal Claims drew a comparison between 767 Third Avenue Associates's facts and those relating to the 1992 and 1994 fences by noting that JRS&G was allowed access to its plant area shortly after it protested the fences. *Id.* However, unlike 767 Third Avenue Associates, the government physically entered JRS&G's property for a prolonged period. Further, remediation equipment was stored on the property for extended periods, and permanent physical structures, fences, were erected. The mere fact that JRS&G was allowed access to portions of the property on request does not alter the fact that the government had a presence of a "permanent nature" on JRS&G's leasehold not later than 1994. See *Skip Kirchdorfer, Inc.*, 6 F.3d at 1583 (holding that "retention of some access rights . . . does not preclude a per se taking").

In addition to concluding that all the events fixing the government's liability occurred not later than 1994, we think that the Court of Federal Claims erred in concluding that JRS&G neither knew nor should have known of those events as of 1994. See *Sand & Gravel I*, 57 Fed. Cl. at 192-93. The Court of Federal Claims found that JRS&G's claims did not stabilize under *Dickinson*, 331 U.S. 745, 67 S. Ct. 1382, 91 L. Ed. 1789, until at least 1996 due to the changing boundaries of the fences and JRS&G's ability to mine within the AIC during the 1992-1996 period.[11] See *Sand & Gravel I*, 57 Fed. Cl. at 192. In *Dickinson*, property owners experienced intermittent flooding and could not determine at the outset the frequency or permanency of the flooding. Thus, only when the situation "stabilized" did a takings claim accrue. 331 U.S. at 749. In *Northwest Louisiana Fish & Game Preserve*

Commission v. United States, 446 F.3d 1285, 1290-91 (Fed. Cir. 2006), we recently applied *Dickinson* to the overgrowth of aquatic weeds in a lake controlled by the United States Corps of Engineers. In contrast, the present case does not involve the type of gradual physical process that was involved in *Dickinson* or *Northwest Louisiana Fish*, but rather the entry of the EPA onto the plaintiff's leasehold. Both the Supreme Court and our court have acknowledged that the *Dickinson* stabilization doctrine is only applicable in cases involving gradual physical processes. See, e.g., *United States v. Dow*, 357 U.S. 17, 27, 78 S. Ct. 1039, 2 L. Ed. 2d 1109 (1958) ("The expressly limited holding in *Dickinson* was that the statute of limitations did not bar an action under the Tucker Act for a taking by flooding when it was uncertain at what stage in the flooding operation the land had become appropriated to public use."); *Ariadne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 879 (Fed. Cir. 1998) ("The *Dickinson* stabilization principle, however, does not apply outside its context. Later cases have essentially confined the stabilization doctrine to the class of flooding cases from which it originated."). We conclude that the Court of Federal Claims erred by extending the *Dickinson* stabilization doctrine outside the realm of gradual physical processes caused by government action, such as flooding or plant overgrowth, into the area of direct government entry onto property. Therefore, JRS&G's takings claim accrued no later than February of 1994. That JRS&G knew or should have known that its claim had accrued at that time is evidenced by the letters written by JRS&G between 1992 and 1994 threatening suit against the EPA. See *Sand & Gravel I*, 57 Fed. Cl. at 184.

Finally, we reject JRS&G's argument that its claim did not accrue until 1998 because the EPA's actions were not authorized until the United States District Court for the Eastern District of Michigan issued its March 1998 order. This argument lacks merit because, when the EPA and its agents entered JRS&G's leasehold, the government was acting in accordance with the authority granted to the EPA by Congress in CERCLA.[12] See *Armijo v. United States*, 229 Ct. Cl. 34, 41, 663 F.2d 90 (1981) (finding a Tucker Act claim viable when Congress authorizes the government to take property).

Because we decide the case on jurisdictional grounds, it is unnecessary to address whether background principles of nuisance and property law, as articulated in Lucas, apply in physical takings, or whether JRS&G took the lease subject to the landfill.

CONCLUSION

In sum, we hold that JRS&G's takings claim accrued not later than February of 1994, when the security fence was complete. JRS&G did not file its complaint until over six years later on May 20, 2002. Therefore, the claim is barred by the statute of limitations and the Court of Federal Claims lacks jurisdiction to consider it. Accordingly, we vacate the Court of Federal Claims's decision and remand the case to the court with the instruction that it dismiss JRS&G's complaint.

COSTS

Each party shall bear its own costs.

VACATED and REMANDED

Appendix A

[SEE DIAGRAM AT END OF APPENDIX].

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 According to the terms of the lease, JRS&G received "exclusive use" of the property

for the purpose of stripping the land, taking out and removing therefrom the marketable stone and sand, which is, [or] which may hereafter be found on, in or under said land, together with the right to construct or build, and to make all excavations, pits openings, ditches, roadways and other improvements upon the said premises, which are or may become necessary or suitable for removing sand and stone from the said premises.

Sand & Gravel III, 62 Fed. Cl. at 564.

n2 The landfill cap system involves a cap of impermeable material over the landfill. The cap is sloped to cause water to run off into a system of ditches. The ditches feed into a designated retention area away from the landfill. *Id.* at 560. The retention area is shown on the map at Appendix A under the heading "Storm Water Retention Pond." The cap system prevents water from percolating through the hazardous waste in the landfill and into the aquifer below, thereby contaminating the groundwater.

n3 A ROD is a public record of an EPA decision that

describes actions the EPA intends to take. See 40 C.F.R. 6.105(g)(2006). This includes the actions the EPA intends to take with respect to a site containing hazardous waste.

n4 The EPA installed the storage pad on the property in 1989 to store the drums excavated on the site. The pad was later abandoned by the EPA. JRS&G does not allege a taking of the storage pad in this appeal. On the map at Appendix A the storage pad is labeled "Asphalt Pad."

n5 The map shows that in 1994 the fence constructed in 1992 still encircled the entirety of JRS&G's plant area and its main pit.

n6 JRS&G's interference included cutting the locks and entering fenced-off portions of the property, blocking the EPA's access to the site by obstructing the access road either by piling dirt on it or by flooding it through overfilling its siltation pond, and threatening to drive its loaders through the gates in the fence unless it was given access to fenced-off portions of the property.

n7 The government moved for judgment on the pleadings, or in the in the alternative, summary judgment. *Sand & Gravel I*, 57 Fed. Cl. at 182-83. The court treated the motion as one for summary judgment because the parties included materials outside the pleadings in their briefing. *Id.* at 185.

n8 On appeal, JRS&G has not challenged the Court of Federal Claims's holding that its takings claim for the groundwater monitoring wells is barred by the statute of limitations.

n9 The Metamora Group consists of twelve corporations that contributed waste to the Metamora Landfill. With one exception, these twelve corporations signed a consent decree with the EPA in 1993 in which they agreed to fund the remediation of the Metamora Landfill. Under the consent degree, the corporations agreed to provide "any compensation that the United States may be required to pay to the property owner."

The Metamora Group filed a motion to intervene on October 24, 2003, which was denied by the Court of Federal Claims. *John R. Sand & Gravel Co. v. United States*, 59 Fed. Cl. 645 (2004). We affirmed the denial "without prejudice to the application of the Metamora Group to participate as amicus curiae in any appeal to this court of the decision on the merits." *John R. Sand & Gravel Co. v. Brunswick Corp.*, 143 Fed. Appx. 317, 319 (Fed.Cir. July 22, 2005). Accordingly, the Metamora Group has filed an amicus brief urging us to find that JRS&G's claim is barred by the statute of limitations. Alternatively, the Metamora Group argues that the decision of the Court of Federal Claims should be affirmed on the merits.

n10 We express no opinion as to whether the construction of the 1992-1993 fence around the entirety of JRS&G's operations was sufficiently permanent for a takings claim to accrue.

Although not argued by the amicus, we note that the EPA's issuance of RODs in 1986 and 1990 was not sufficient for a physical takings claim to accrue in this case. In *Goodrich v. United States*, 434 F.3d 1329 (Fed. Cir. 2006), we found that a takings claim accrued upon the issuance of an ROD ordering that Goodrich allow

another rancher's animals to drink on his allotment of federal land. *Id.* at 1332. The agency specified both the number of animals and the rancher to whom they belonged. *Id.* We affirmed the Court of Federal Claims's characterization of the taking as regulatory rather than physical and its finding that the regulatory takings claim accrued upon the issuance of the ROD. *Id.* at 1333-35. We find that the date of issuance of the 1986 and 1990 RODs did not mark the accrual of JRS&G's takings claim for two reasons. First, unlike Goodrich, JRS&G's claim is for a physical taking, rather than a regulatory taking. Second, the two RODs issued with regard to the Metamora Landfill did not contain the level of detail about the government's actions necessary for a claim to accrue. The 1986 ROD set forth remedies for removal of drums of waste, which the EPA predicted would take six to eight months. The 1986 ROD did not set forth the long-term plan for site remediation challenged by JRS&G. The 1990 ROD did propose a long-term remediation plan involving a landfill cap system. However, the ROD did not set forth the metes and bounds of the landfill cap or a specific timeframe for its completion. *Sand & Gravel I*, 57 Fed. Cl. at 184.

n11 On appeal, JRS&G states that it mined within the AIC as late as 1997. For purposes of our decision, whether JRS&G last mined within the AIC in 1996 or 1997 does not matter.

n12 Pursuant to CERCLA, the EPA is "authorized to enter at reasonable times any . . . facility, establishment, or other place or property where any hazardous substance or pollutant or contaminant may

be or has been generated, stored, treated, disposed of, or transported from." 42 U.S.C. § 9604(e)(1), (e)(3)(A).

NEWMAN, Circuit Judge, dissenting.

The threshold question is whether, more than six years before this suit was filed, all of the events occurred whereby government action can be held to have permanently deprived JRS&G of its property rights. This is a question of fact, and its answer determines whether this lawsuit was timely brought. However, it is not a question of "jurisdiction," for the Court of Federal Claims, without dispute, had jurisdiction of the parties and the subject matter. See *United States v. Causby*, 328 U.S. 256, 267, 66 S. Ct. 1062, 90 L. Ed. 1206, 106 Ct. Cl. 854 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine"). The text of the statute confirms that the limitations period is applied to claims of which the Court of Federal Claims already "has jurisdiction":

28 U.S.C. § 2501. Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Contrary to the position of the panel majority, the limitations period is not itself a matter of jurisdiction. See *Ariadne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 878 (Fed. Cir. 1998) (the "statutory language confirms that the question of a time bar on [plaintiff's] claim does not affect the subject matter jurisdiction of the Court of Federal Claims"); *Grass Valley Terrace v. United States*, 69 Fed. Cl. 341, 347 (2005) ("This plain

English interpretation of the statute is supported by the Federal Circuit cases that have *closely examined* this issue") (emphasis in original). My colleagues read the phrase "has jurisdiction" out of the statute and thereby violate the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001). Their interpretation is also inconsistent with the trial court's own rules, which state that the "statute of limitations" is an "affirmative defense." Rule of the Court of Federal Claims 8(c).

The panel majority reasons that § 2501 is "jurisdictional" because it is a "condition that must be met for a waiver of sovereign immunity in a suit for money damages against the United States." Maj. op. at 17. That is incorrect. Section 2501 is an unexceptional statute of limitations that is interpreted like any other statute of limitations. See *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 94, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990) (statutes of limitations on suits against the government should be treated "in the same way" as statutes of limitations in private suits); *Franconia Associates v. United States*, 536 U.S. 129, 145, 122 S. Ct. 1993, 153 L. Ed. 2d 132 (1986) ("limitations principles should generally apply to the Government in the same way that they apply to private parties"). In *Franconia Associates* the Court rejected the government's attempt to ascribe a "special" interpretation to § 2501 on a theory of sovereign immunity:

We do not agree that § 2501 creates a special accrual rule for suits against the United States. Contrary to the Government's contention, the text of § 2501 is unexceptional: A number of contemporaneous state statutes of limitations applicable to suits between private parties also tie the commencement of the limitations period to the date a claim "first accrues." . . . In line with our recognition that limitations principles should generally apply to the Government "in the same way that" they apply to private parties, we reject the Government's proposed construction of § 2501. That position, we conclude, presents an "unduly restrictive" reading of the congressional waiver of sovereign immunity, rather than "a realistic assessment of legislative intent."

536 U.S. at 145 (internal citations omitted). My colleagues make the same mistake; they fail to see § 2501 for what it is: an "unexceptional" statute of limitations that is interpreted like any other. Instead, they impose an "unduly restrictive" interpretation on § 2501, transforming it into a "jurisdictional" statute, contrary to the statutory text, and contrary to precedent.

The panel majority relies on Supreme Court cases interpreting a superceded statute, and Federal Circuit panel decisions applying overruled precedent. For example, *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988) relies on *Soriano v. United States*, 352 U.S. 270, 276, 77 S. Ct. 269, 1 L. Ed. 2d 306 (1957), which interprets § 2501 as a jurisdictional bar not subject to tolling. The Court in *Irwin* overruled *Soriano*, and clarified that limitations principles apply to the government "in the same way" as

they are applied to private parties,e.g., they may be tolled or waived in appropriate circumstances. *Irwin*, 498 U.S. at 94-96. My colleagues cite *Goodrich v. United States*, 434 F.3d 1329, 1336 (Fed. Cir. 2006), and *Caguas Cent. Fed. Savings Bank v. United States*, 215 F.3d 1304, 1310 (Fed. Cir. 2000), which rely solely on *Hopland*. They also cite *Frazer v. United States*, 288 F.3d 1347, 1351 (Fed. Cir. 2002), which cites *Caguas, and Indiana Michigan Power Co. v. United States*, 422 F.3d 1369, 1378 (Fed. Cir. 2005), which cites *Hart v. United States*, 910 F.2d 815, 818-19 (Fed. Cir. 1990), a case also citing *Hopland*. None of these cases grounded on *Hopland* accounts for the Court's recent jurisprudence, under which it is clear that it is incorrect to accord unique status to § 2501 and hold that it is a limit on "jurisdiction." My colleagues also cite *Martinez v. United States*, 333 F.3d 1295 (Fed. Cir. 2003) (*en banc*), which left the matter unresolved.

In contrast, other panel decisions have correctly interpreted § 2501 as a statute of limitations, not a jurisdictional limit on the Court of Federal Claims. See *Venture Coal Sales Co. v. United States*, 370 F.3d 1102, 1105 n.2 (Fed. Cir. 2004) ("The most precise ground for the trial court's decision here therefore would seem to be that Venture Coal failed to make its claim within the required limitations period -- that is not a question of subject matter jurisdiction of the" Court of Federal Claims); *Ariadne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 878 (Fed. Cir. 1998) ("the question of a time bar on [plaintiff's] claim does not affect the subject matter jurisdiction of the Court of Federal Claims"); *Henke v. United States*, 60 F.3d 795, 798 n.3 (Fed. Cir. 1995) ("The raising of the statutory bar to a remedy does not, as such, deprive the court of jurisdiction to

hear the cause in the first instance. Indeed, the court could not adjudicate the question of the proper application of the statute if it did not have subject matter jurisdiction over the claim"); *Borough of Alpine v. United States*, 923 F.2d 170, 171 n.1 (Fed. Cir. 1991) (despite an untimely filing the "Claims Court has and will continue to have jurisdiction over the subject matter of Contract Disputes Act cases").

The Supreme Court has, in several recent statements, emphasized that statutes of limitations and time prescriptions are not "jurisdictional." See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 1242, 163 L. Ed. 2d 1097 (2006) (stating that the Court has established that time prescriptions are not jurisdictional); *Day v. McDonough*, 126 S. Ct. 1675, 1681, 164 L. Ed. 2d 376 (2006) ("A statute of limitations defense, the State acknowledges, is not 'jurisdictional,' hence courts are under no *obligation* to raise the time bar *sua sponte*") (emphasis in original); *Eberhart v. United States*, 546 U.S. 12, 126 S. Ct. 403, 405, 163 L. Ed. 2d 14 (2005) ("They are not 'jurisdiction[al],' but are instead 'claim-processing rules,' that may be 'unalterable on a party's application' but 'can nonetheless be forfeited if the party asserting the rule waits too long to raise the point'"); *Scarborough v. Principi*, 541 U.S. 401, 414, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004) (time prescriptions are "not properly typed 'jurisdictional'"); *Kontrick v. Ryan*, 540 U.S. 443, 456, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004) ("Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory

authority").

Thus, the question is whether the statute that sets a six-year limit on claims against the United States has been met on the facts affecting JRS&G. Both the government and JRS&G agree that the statute of limitations has not run. Since it is not "jurisdictional," it need not be considered *sua sponte* by this court.

Despite this clear waiver and concession by the government, my colleagues overrule the Court of Federal Claims, reject the position of the government, and hold that the six-year limitations period started to accrue by February 1994 when the EPA erected its first transient security fence. The Court of Federal Claims found that JRS&G had access to and mining use of much of that property until at least the December 1996 Administrative Order, for the EPA soon moved the fence to enclose a smaller area, and also permitted access by JRS&G to mine sand and gravel in parts of the smaller area. The government recognized and testified that JRS&G was not permanently excluded from the property until May 1998. See Defendant's Response to the Court's Order of July 7, 2004 ("it appears that it was not until May 1998 . . . that plaintiff was clearly and permanently excluded from the AIC [Area of Institutional Controls]"). Nonetheless, my colleagues now rule that since the fence was not entirely removed, the February 1994 exclusion was a permanent taking of the entire area including the area that was used by JRS&G until judicial intervention in 1998.

The Court of Federal Claims applied the Court's three-part test of *Loretto v. Teleprompter Manhattan CATV*

Corp., 458 U.S. 419, 435, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982), viz. that a taking occurs only when the property owner has lost the rights to possess, use, and dispose of the property. See, e.g., *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002) (applying the Loretto test). In this case, the Court of Federal Claims found that the three-part test had not been met, except for the permanent wells, because JRS&G retained beneficial use of the property at least until December 1996. No error has been shown in that analysis. On that finding, which must be sustained, the statute of limitations cannot have run.

I am concerned that the court's position today brings serious imprecision to takings law. My colleagues hold that the entire claim is now barred and that irrevocable limitations accrued as to property that JRS&G continued to use during a period for which a Fifth Amendment claim was conspicuously unavailable. The panel majority cites various actions such as "lawyers' letters" to support its theory that JRS&G had knowledge that a taking had already occurred in February 1994, maj. op. at 24, although the effect of the letters was the removal of the fence. The question before the Court of Federal Claims was whether a compensable taking occurred in February 1994 as to the property that was restored to use by JRS&G until at least December 1996. When that court's findings as to the extent of this access and use are reviewed on the appropriate standard of appellate review, the findings must be sustained.

Thus I would affirm the holding of the Court of Federal Claims that the limitations period had not accrued in 1994, and would reach the merits of the takings claim.

On the merits, I would affirm that JRS&G is not entitled to compensation for a larger land area than measured by the permit wells, for JRS&G was aware of the landfill when it took the leasehold. I would affirm the Court of Federal Claims on this ground.

No. 02-509 L

UNITED STATES COURT OF FEDERAL CLAIMS

JOHN R. SAND & GRAVEL COMPANY,
Plaintiff,

v.

THE UNITED STATES, Defendant.

October 29, 2004, Filed

COUNSEL: Jeffrey K. Haynes, Bloomfield Hills, MI, for plaintiff. L. Rider Brice, III, Bloomfield Hills, MI, of counsel.

John S. Most, with whom were Thomas L. Sansonetti, Assistant Attorney General, Susan V. Cook and Steven Bryant, Environment & Natural Resources Division, United States Department of Justice, Washington, DC, for defendant.

OPINION

HEWITT, Judge

This case is before the court following trial on plaintiff John R. Sand & Gravel Co.'s claim that the federal government violated the Fifth Amendment of the United States Constitution by physically taking plaintiff's property interest during the environmental remediation of the Metamora Landfill in Lapeer County, Michigan. First Supplemental Complaint (Supp. Compl.) ¶¶ 1, 2, 51-71.

I. Background[1]

In 1969, plaintiff John R. Sand & Gravel Co. (John R. Sand) leased from Russell and Mildred Parrish a tract of land in Metamora Township, Lapeer County, Michigan for a term of fifty years. Stipulated Facts (Stip. Facts) ¶ 1; Joint Exhibit (JX) 1 (Sand and Gravel Lease (Lease)). Plaintiff's Lease from the Parrishes included an area used as a landfill (the Landfill). See Transcript of Trial (Tr.) at 362:11-24 (Testimony of Mr. Evatz, stating that the Metamora Landfill is included within plaintiff's leasehold); Stip. Facts. ¶ 3 (stating that the northern portion of plaintiff's leasehold includes the Metamora Landfill site); see also *John R. Sand & Gravel Co.*, 57 Fed. Cl. 182, 183 n.3 (2003) (describing plaintiff's 158-acre leasehold as "rectangular in shape" with plaintiff's primary operations located in the property's center and a north-south access road just to the west of this area).[2]

Russell Parrish began operating an unregulated, open dump, known as the "Metamora Village dump" in 1955. See Defendant's Exhibit (DX) 103, at 0039779 (Deposition of Eugene L. Parrish in *Ray Indus., Inc. v. Liberty Mut. Ins. Co.*, No. 88 CV 73445 DT (E.D. Mich. May 10, 1989) [Parrish Deposition], stating that his father, Russell Parrish, began operating the Metamora Village dump in 1955); JX 5, at 01280 (United States Environmental Protection Agency, Record of Decision (1990) [1990 ROD], stating that the Landfill began in 1955 as a "privately owned, unregulated open dump"). In 1966, the dump was converted into a landfill. DX 103, at 0039779-80 (Parrish Deposition, supra); DX 71 (Mich. Dep't of Natural Res., Metamora Landfill, Lapeer County, Magnetometer Survey at 1 (1982) [Magnetometer Survey]). It was also in 1966 when the

Landfill began accepting refuse from commercial haulers, including liquid waste in fifty-five gallon drums. DX 103, at 0039780-81 (Parrish Deposition, supra). "In 1969, the landfill was upgraded to meet existing standards, and licensed to receive general refuse." JX 5, at 01280 (1990 ROD, supra). In the mid- to late-1970s, Eugene Parrish, Russell Parrish's son, took over operation of the Landfill, see DX 71 (Magnetometer Survey, supra, at 1, stating that Eugene Parrish "assumed full control of the facility operation in 1978"); DX 103, at 0039806 (Parrish Deposition, supra, stating that Eugene Parrish took over operation of the Landfill in 1974 and stopped accepting drums at the Landfill). The Landfill lost its license in 1979, DX 71 (Magnetometer Survey, supra, at 1), and closed in 1980, DX 103, at 0039905 (Parrish Deposition, supra); DX 51 at 1 (Schedule for Final Closure in In re Metamora Sanitary Landfill (Mich. Dep't of Natural Res. Sept. 17, 1980) ("Further receipt of refuse shall be terminated as of November 30, 1980.")).

Following closure of the Metamora Landfill in 1980, "several environmental site investigations were conducted, culminating in the inclusion of the site on the [EPA's] National Priorities List [pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § § 9601-9675 (2000)] on October 15, 1984." JX 57, at 0007 (Eder Associates, Metamora Landfill Site Remedial Action Close-Out Report (1994)); see also Stip. Facts ¶ 6 (stating that the EPA placed the Metamora Landfill site on its National Priority List of Hazardous Waste Sites in 1984). These investigations identified contaminants of concern (including volatile

organic compounds and polychlorinated biphenyl compounds) in buried drummed liquid and solid wastes. JX 57, at 0007 (Eder Associates, Metamora Landfill Site Remedial Action Close-Out Report (1994)). For purposes of remediation, the site was divided into two phases: Operable Unit 1 addressed drum excavation and removal, and Operable Unit 2 addressed the remediation of the rest of the site, including the Landfill and the groundwater.[3] Tr. at 1010:16-1011:14 (Testimony of Mr. Turchan). The EPA issued Records of Decision (ROD) which describe the problem and the remedy chosen for each operable unit. See Tr. at 898:12-16 (Testimony of Mr. Henry, defining a ROD as a document that provides "a description of the problem and a commitment by the EPA to have certain work performed in response to the environmental conditions at the site"). It is the remedy for Operable Unit 2 that led to construction of a perimeter fence around the Landfill site. See JX 5, at 01314 (1990 ROD, supra, calling for the "installation of fencing to restrict access to areas of the Site where certain remedial measures are to be installed"). The fence is part of the Landfill cap system, which consists of

> (a) a cap extending to approximately the edge of the waste, (b) a gradual slope from the top of the cap to permit surface water to run down and away from the landfill mass and to prevent erosion, (c) stormwater ditches and retention pond, (d) access roads, (e) site-security fence to control access, (f) installation, monitoring, and maintenance of a landfill gas venting system, and (g) implementation of access/deed restrictions.

Stip Facts. ¶ 16; see also JX 5, at 01313-14 (1990 ROD, supra, describing the selected remedy). Although the fence was moved many times, see DX 248 (Conestoga-Rovers & Associates, Current and Historical Fence Alignments, 1991-2003 at 1-2 (2004)), the May 1998 fence, which plaintiff alleges caused the physical taking of plaintiff's property interest, see Plaintiff's Brief Concerning [Expert Opinion Testimony and Accrual Date] at 10 ("The physical occupation occurred when [plaintiff] was permanently excluded from the Area of Institutional Controls portion of its leasehold. This event occurred in May 1998 when government agents installed a fence around the Area of Institutional Controls."), enclosed what is known as the "Area of Institutional Controls" (AIC).[4] See Tr. at 118:3-4, 120:11-17 (Testimony of Dr. Campbell, stating that paragraph 6(g) of JX 45 describes the AIC); JX 45 (Administrative Order Directing Compliance with Request for Access in In re Metamora Landfill Site, No. 97-C-379 ¶ 6(g) (EPA Dec. 18, 1996), describing "the area covered by the landfill cap"). The fence was relocated again in December 2003 to enclose a smaller area. Tr. at 154:24-155:23 (Testimony of Dr. Campbell); see also DX 248 (Conestoga-Rovers & Associates, Current and Historical Fence Alignments, 1991-2003 at 2 (2004)).

When plaintiff entered into the Lease with the Parrishes, in 1969, refuse had been dumped on the northern portion of the leased property for fourteen years (since 1955). The Parrishes then continued to operate the Landfill during the first eleven years of plaintiff's lease term, until 1980. In 2002, four years after the construction of the May 1998 fence, plaintiff filed suit in this court, seeking compensation for the

federal government's alleged physical taking of plaintiff's property. Supp. Compl. ¶ 1. Before this case reached trial, the parties filed two rounds of summary judgment motions. In the court's first summary judgment opinion, the court decided that plaintiff's taking claim was not time-barred (except with respect to the "areas of the property covered by permanently installed and not abandoned monitoring wells"). *John R. Sand & Gravel Co. v. United States*, 57 Fed. Cl. 182, 189, 193 (2003) (*John R. Sand I*). In the court's second summary judgment opinion, the court interpreted the Supreme Court's articulation of the nuisance and background principles exceptions to takings liability in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), to apply to physical takings. *John R. Sand & Gravel Co. v. United States*, 60 Fed. Cl. 230, 239 (2004) (*John R. Sand II*). The court found, however, that the exceptions did not apply to the facts as then presented to the court. *Id.* at 250-51.

In the summer of 2004, the court conducted a five-day liability trial in Detroit, Michigan, during which the court heard the testimony of thirteen witnesses and admitted into evidence some 110 exhibits. Plaintiff argued that its Lease is a valid property interest; that its property interest is not encumbered by background principles of Michigan property or nuisance law, or in any other significant manner; and that a portion of its leasehold was permanently taken by defendant's actions. Plaintiff's Post Trial Brief (Pl.'s Br.) at 30-31. Defendant argued that plaintiff does not have a valid property right to mine sand and gravel, Defendant's Opening Post-Trial Memorandum (Def.'s Br.) at 23-34; that plaintiff acquired its property interest subject to

the Landfill, *Id.* at 34-43; that mining would create a nuisance and violate state law, *Id.* at 43-58, 70-78; and that defendant did no more than duplicate the result that would have been reached under background principles of state law, *Id.* at 58-70.

In addition to the trial record, the court had the opportunity to consider post-trial briefings filed by the parties. Factual findings, in addition to those described above, will be made, as necessary, in the sections that follow.

II. Discussion

The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960); see also *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1371 (Fed. Cir. 2004) ("The purpose of [the Takings Clause] is to prevent 'Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978))).

The Supreme Court has recognized that the government may take private property either by physical invasion or by regulation. See *Lucas*, 505 U.S. at 1014-15 (stating that the Takings Clause was interpreted to apply only to physical takings until 1922,

when the Supreme Court stated that a regulation that goes too far will be recognized as a taking). This case involves an alleged physical taking. A physical taking occurs "when the government encroaches upon or occupies private land for its own proposed use." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 150 L. Ed. 2d 592, 121 S. Ct. 2448 (2001). The first step in analyzing a physical taking claim is to determine whether a claimant has a property interest. See, e.g., *Am. Pelagic Fishing Co.*, 379 F.3d at 1372 ("First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment."); *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1580 (Fed. Cir. 1993) (stating, in a physical takings case, that "[a] taking compensable under the Fifth Amendment inherently requires the existence of 'private property.'"). The second step in a takings analysis is to determine whether a taking has occurred. See, e.g., *Am. Pelagic Fishing Co.*, 379 F.3d at 1372 ("Second, after having identified a valid property interest, the court must determine whether the governmental action at issue amounted to a compensable taking of that property interest."); *Skip Kirchdorfer*, 6 F.3d at 1582 ("To recover under the *Takings Clause*, a claimant with a recognized property interest must show that its interest was 'taken.'").

A plaintiff bears an initial burden of demonstrating that a property interest exists. See, e.g., *Skip Kirchdorfer*, 6 F.3d at 1580 ("The plaintiff must show a legally cognizable property interest."). Courts look to state law "to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments." *Lucas*, 505 U.S. at 1030. If background principles of a state's nuisance and

property law bar a property owner from using land in a certain way, then the *Takings Clause* does not require compensation for an alleged taking to abate that use. *Id.* at 1031-32. To resist compensation under this theory, "[the defendant] must identify background principles of nuisance and property law that prohibit the uses [the plaintiff] now intends in the circumstances in which the property is presently found." *Id.* at 1031. If a defendant can show such an inherent limitation in the plaintiff's title, then nothing is taken. *Id.* at 1031-32.[5]

The court examines plaintiff's taking claim within the framework set out by the court's prior opinion in *John R. Sand II*:

> First, plaintiff must demonstrate that it possesses a property interest. Second, defendant must identify background principles of Michigan property or nuisance law that would prohibit the use of the land plaintiff intends. This step involves determining the relevant contours of Michigan property and nuisance law. Third, defendant must connect the state law to the facts of this case to show, for example, that the exercise of plaintiff's claimed property rights would be a nuisance and that actions by the government of which plaintiff complains are actions that could be taken under Michigan law to abate the nuisance.

60 Fed. Cl. at 240. After completing this analysis, if the court finds plaintiff possesses a property interest, then the court must determine whether that interest was taken. See *Skip Kirchdorfer*, 6 F.3d at 1582 ("To

recover under the Takings Clause, a claimant with a recognized property interest must show that its interest was 'taken.'"). The court turns first to the question of whether plaintiff possesses a property interest.

A. Whether Plaintiff Possesses a Compensable Property Interest

Federal courts look to state law to "define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments." *Lucas*, 505 U.S. at 1030; see also *McKay v. United States*, 199 F.3d 1376, 1381 (Fed. Cir. 1999) ("The trial court was correct to look to [state] law to determine if . . . there was a property right that could be violated, since the Fifth Amendment protects rather than creates property interests."). Plaintiff argues that plaintiff's leasehold is an interest in real property. Pl.'s Br. at 4. Defendant argues that because, at the time of the alleged taking, plaintiff did not possess the necessary Metamora Township permits to mine in the AIC as required by its Lease and because mining would be illegal anywhere on the property, plaintiff does not have a valid property right. Def.'s Br. at 23, 29.

1. Accrual Date of Taking Claim

Before determining whether plaintiff possesses a property interest under Michigan law, however, the court must first determine when plaintiff's taking claim first accrued because the scope of plaintiff's property interest is determined at the moment prior to that date.[6] Although the parties agree that plaintiff's taking claim accrued in May 1998, see Plaintiff's Brief Concerning [Expert Opinion Testimony and Accrual Date] at 7 (arguing that May 1998 is the date when

plaintiff was completely and permanently excluded from the AIC); Defendant's Special Briefing in Response to the Court's Order of July 7, 2004, at 3 ("It appears that it was not until May 1998 . . . that plaintiff was clearly and permanently excluded from the AIC."), the date of first accrual of a takings claim is a matter of law, see *Banks v. United States*, 314 F.3d 1304, 1307-08 (Fed. Cir. 2003) (stating that the appellate court reviews matters of law de novo and applying that standard to the trial court's decision to dismiss a takings claim as time-barred, which requires analysis of when the claim first accrued).

The Supreme Court has stated that, in the case of a physical taking, the act of the government entering into possession of the property constitutes the act of taking. *United States v. Dow, 357 U.S. 17*, 22, 2 L. Ed. 2d 1109, 78 S. Ct. 1039 (1958). The Court has also stated that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982). A physical occupation is "a permanent and exclusive occupation by the government that destroys the owner's right to possession, use, and disposal of the property." *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002). The date on which a property interest is "clearly and permanently taken" is the "key date for accrual purposes." *Boling v. United States*, 220 F.3d 1365, 1370 (Fed. Cir. 2000). Thus, plaintiff's taking claim first accrued when it became clear that the government was permanently and exclusively occupying the portion of plaintiff's leasehold alleged to have been taken.

The court finds that plaintiff's taking claim accrued in May of 1998, when defendant's agents completed relocation of a perimeter fence around the AIC. See JX 25 (Letter from Campbell to Haynes of 5/12/98, stating that "relocation of sections of the Site security fence has been completed"). Prior to that time, ongoing access disputes prevented defendant from permanently and exclusively occupying the AIC.[7] The government's action, through its representatives, in completing the fence relocation in May 1998 extinguished plaintiff's right to possess, use, and dispose of its property interest. See *Loretto*, 458 U.S. at 435 ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378, 89 L. Ed. 311, 65 S. Ct. 357 (1945))). The May 1998 fence permanently and absolutely excluded plaintiff from the AIC. See Stip. Facts ¶ 20 (stating that the May 1998 fence "completely excluded plaintiff from the [AIC]"); see also *Loretto*, 458 U.S. at 435 n.12 (stating that "the permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude"). Because plaintiff's taking claim accrued in May 1998, it is as of this date that the court evaluates the scope of plaintiff's property interest.

2. Whether Plaintiff Complied with Lease

Plaintiff's claimed property interest arises from its Lease.

The Lease of approximately 158 acres of land in Lapeer County, Michigan for a term of fifty years (from August 1, 1969). See JX 1 (Lease ¶¶ 1-2); Tr. at 362:8-10 (Testimony of Mr. Evatz regarding the size of the leasehold estate). The lessors own the property in fee

simple absolute. See JX 1 (Lease ¶ 5, stating, "The parties of the first part covenant and warrant that they are the owners of the above described premises in fee simple and absolute . . . .").[8] The land was

> leased to the exclusive use of [John R. Sand] for the purpose of stripping the land, taking out and removing therefrom the marketable stone and sand, which is, or which may hereafter be found on, in or under said land, together with the right to construct or build, and to make all excavations, pits openings, ditches, roadways and other improvements upon the said premises, which are or may become necessary or suitable for removing sand and stone from the said premises.

JX 1 (Lease ¶ 1). Paragraph seven of the Lease provides that John R. Sand "agrees to operate its mining operations according to the Zoning Ordinance for the Township of Metamora and according to all conditions as required in a Gravel and Sand Mining Permit as issued by the Township of Metamora, Lapeer County, Michigan." JX 1 (Lease ¶ 7). Paragraph nine of the Lease provides for automatic cancellation of the Lease "should [John R. Sand] fail to remove any sand or stone from the premises and fail to make payment . . . for a twelve (12) month period." JX 1 (Lease ¶ 9).

Under Michigan law, "a leasehold and rights derived from a leasehold[] constitute 'property,' for the taking of which just compensation must be made or secured." *Lookholder v. State Highway Comm'r*, 91 N.W.2d 834, 838, 354 Mich. 28 (Mich. 1958) (citations omitted); see also *United Coin Meter Co. v. Gibson*, 109 Mich. App.

652, 311 N.W.2d 442, 444 (Mich. Ct. App. 1981) (stating that a lease agreement transfers to the tenant a possessory estate (citing *Nowlin Lumber Co. v. Wilson*, 119 Mich. 406, 78 N.W. 338 (1899))). "A lease . . . gives the tenant possession of the property leased and exclusive use or occupation of it for all purposes not prohibited by the terms of the lease." *United Coin Meter Co.*, 311 N.W.2d at 444. Additionally, unsevered sand and gravel is real estate. See *Rolland Township v. Pakes*, 226 Mich. 284, 197 N.W. 525, 526-27 (Mich. 1924) (reporting the finding of the circuit judge that "gravel in a pit unremoved is real estate" and later stating that "when the gravel was severed and removed, it was not real estate"). Because plaintiff possesses a property interest recognized under Michigan law and because "'every sort of [real property] interest the citizen may possess' counts as a property interest under the Fifth Amendment," *Cienega Gardens v. United States*, 331 F.3d 1319, 1329 (Fed. Cir. 2003) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378, 89 L. Ed. 311, 65 S. Ct. 357 (1945)), the court finds that plaintiff possesses a type of property interest that is compensable under the Fifth Amendment.

Defendant argues, however, that the Lease is no longer in effect because plaintiff failed to comply with it. The parties agree that paragraph nine of the Lease requires plaintiff either to remove sand or stone or to pay royalties at least once per year. See Defendant's Post-Trial Reply Memorandum (Def.'s Resp. Br.) at 29 ("Paragraph 9 of the lease requires that John R. Sand remove sand or stone from the premises or pay royalties at least once a year."); Pl.'s Br. at 7 n.3 ("The lease will not be cancelled if plaintiff removes sand or stone or pays royalties."). The court agrees with the

parties' interpretation of paragraph nine. The parties disagree about whether plaintiff has complied with the requirements of paragraph nine. Compare Def.'s Resp. Br. at 29 (arguing that the "evidence does not demonstrate" that plaintiff has complied with paragraph nine) with Pl.'s Br. at 7 ("Plaintiff has fulfilled its lease obligations to either remove sand or stone from the leasehold or pay the landlord."). The 1992-1993 time frame is the focus of this dispute. See Def.'s Resp. Br. at 30 (referring to plaintiff's 1992 and 1993 corporate filings and Mr. Evatz's visit to the leasehold site in 1992); Pl.'s Br. at 7 & n.4 (same).

The parties have pointed to three types of evidence that bear on the question of whether plaintiff has complied with paragraph nine of its Lease. Plaintiff points to plaintiff's yardage book (Yardage Book). Pl.'s Br. at 7. Defendant points to witness testimony regarding visits to the leasehold site in the early 1990s and to plaintiff's 1992 and 1993 corporate filings. Def.'s Resp. Br. at 29-30.

Plaintiff's president, Mr. Evatz, testified that the Yardage Book "keeps track of the yardage of material that we sell, so that we can pay Parrish's royalty." Tr. at 496:21-23. The Yardage Book covers the 1981-2004 time period. Tr. at 497:2-4 (Testimony of Mr. Evatz); see also Plaintiff's Exhibit (PX) 50 (Yardage Book). Plaintiff argues that plaintiff's Yardage Book is the "best evidence of its operations." Pl.'s Br. at 7 n.4. Defendant disagrees and attacks the reliability of the Yardage Book by pointing to Mr. Evatz's testimony. Def.'s Resp. Br. at 29-30. Defendant first draws the court's attention to Mr. Evatz's testimony that he removed two yards of "gravel" in August of 1992. Def.'s Resp. Br. at 30; see also Tr. at 390:21-22, 504:4-5

(testimony of Mr. Evatz, stating that he removed two cubic yards of gravel). Defendant points out that the Yardage Book indicates that two cubic yards of sand, not gravel, were removed. Def.'s Resp. Br. at 30; see also PX 50, at 20215 (Yardage Book, reflecting that the "2" entry for August 5, 1992 appears in the "Sand" column). However, Mr. Evatz explained that the only product that is recorded in the "Stone" column in the Yardage Book is "6A," which is used for making concrete. Tr. at 504:6-9. The column labeled "Sand" is for all other products, such as sand, pea pebbles and 60/40 road gravel. Tr. at 504:10-11. Mr. Evatz further explained that the royalty agreement dictated this division. Tr. at 504:7-12. Paragraph three of the Lease states that John R. Sand & Gravel Company is to pay the Parrishes "ten cents (.10[cent]) per yard for the sand and pea pebbles and (15[cent]) per yard for the stone." JX 1 (Lease ¶ 3). The court credits Mr. Evatz's explanation of the apparent discrepancy between his testimony and the Yardage Book and does not view the discrepancy as impugning the reliability of the Yardage Book.

Second, defendant argues that the two payments indicated in the Yardage Book for the August 1992 period "appear to be in different handwriting[,] yet, Mr. Evatz testified that he made the August 1992 entry himself." Def.'s Resp. Br. at 30; see also Tr. at 508:211 (testimony of Mr. Evatz stating that he made the entries in the Yardage Book). Defendant presented no trial testimony regarding whether the entries for the August 1992 payments were in the same handwriting. Defense counsel is neither an expert qualified to opine regarding handwriting nor a lay person familiar with Mr. Evatz's handwriting. Cf. *United States v. Mooney*,

315 F.3d 54, 61-63 (1st Cir. 2002) (upholding the district court's decision to admit the testimony of a handwriting expert under Federal Rule of Evidence 702); *United States v. Barker*, 735 F.2d 1280, 1283 (11th Cir. 1984) (upholding the district court's decision to admit the testimony of two lay witnesses who were familiar with defendant's handwriting regarding their opinion of whether defendant's handwriting appeared on traveler's checks under Federal Rules of Evidence 701 and 901(b)(2)). The court does not find that defendant's unsupported assertion provides any reason to question the reliability of plaintiff's Yardage Book.

Third, defendant points to certain extrinsic evidence-site visits in the early 1990s and corporate filings-to assail the reliability of plaintiff's Yardage Book. Def.'s Resp. Br. at 29-30. Two witnesses testified that when they visited the Metamora Landfill site in the early 1990s the mining operation was inactive. See Tr. at 201:13-18 (Testimony of Dr. Campbell, stating that when he visited the site in the spring of 1992, he "didn't see any signs of activity"); Tr. at 1020:14-22, 1031:3-8 (Testimony of Mr. Turchan, stating that when he visited the site in April 1990, his "initial impression was that it was an inactive [mining] operation"). Plaintiff's 1992 and 1993 corporate filings characterize plaintiff's business as an "inactive" sand and gravel pit. DX 14, at 000012, 000014. The court does not find the testimony of the site visitors or the statement in corporate filings to be dispositive with respect to whether plaintiff removed sand or gravel or paid royalties within any given twelve-month period. The payment of royalties could occur even if a mining operation were inactive. The Lease does not specify what quantity of sand or gravel had to be removed from

the premises. A small amount of sand or gravel could have been removed from the premises without activating the mining operation. And, in fact, the testimony of plaintiff's president supports this conclusion. Mr. Evatz testified that when he became president of John R. Sand in 1992, he went to the leasehold site and removed and sold two yards of sand to keep the Lease open. Tr. at 355:24-356:1, 390:18-22. He testified that he recorded this transaction in the Yardage Book. Tr. at 504:13-21, 508:1011; PX 50, at 20215 (Yardage Book).

Because the court credits plaintiff's testimony with respect to the removal and sale of sand in 1992, the court finds, consistent with the business record contained in the Yardage Book, that plaintiff's Lease was not terminated by non-compliance with the obligation to mine or pay royalties. See Def.'s Resp. Br. at 29 (acknowledging that "the Yardage Book appears to contain entries suggesting that plaintiff fulfilled the requirements of ¶ 9"); Pl.'s Br. at 7 (arguing that testimony demonstrates that "plaintiff has fulfilled its lease obligations to either remove sand or stone from the leasehold or pay the landlord").

3. Whether State and Local Mining Permits are Necessary to Establish Property Interest

Defendant argues that, in May 1998, plaintiff was not in compliance with Metamora Township zoning ordinances, did not possess a permit to mine from Metamora Township, did not possess a Soil Erosion and Sedimentation Control permit from Lapeer County, did not possess a groundwater discharge permit from the state of Michigan, Def.'s Br. at 23-34, and that plaintiff's "lack of state and local permits renders its property

interest uncompensable," Def.'s Resp. Br. at 32 (emphasis omitted). This is because plaintiff's Lease grants it only the right to mine sand and gravel. Def.'s Br. at 23; JX 1 (Lease ¶ 1). Defendant's argument is that if, under state and local law, plaintiff cannot mine sand and gravel, then the government, by excluding plaintiff from the AIC, has not taken anything from plaintiff. See Def.'s Br. at 29 ("John R. Sand does not [possess] the necessary local permission to undertake the use of its property-mining in the AIC-that it complains has been taken. Accordingly, plaintiff's exclusion [from] the AIC has not deprived it of a right otherwise enjoyed under the terms of its lease.").

Defendant cites a number of cases to support its argument. Def.'s Br. at 29 (citing *United States v. Hill*, 896 F. Supp. 1057 (D. Colo. 1995); *City Nat'l Bank v. United States*, 33 Fed. Cl. 224 (1995); *Plantation Landing Resort, Inc. v. United States*, 30 Fed. Cl. 63 (1993)); Def.'s Resp. Br. at 31 (citing *United States v. Willow River Power Co.*, 324 U.S. 499, 89 L. Ed. 1101, 65 S. Ct. 761, 103 Ct. Cl. 797 (1945)). Plaintiff argues that these cases "deal with instances where the plaintiff could only obtain its property interest via the permit in question." Plaintiff's Response to Defendant's Post Trial Memorandum (Pl.'s Resp. Br.) at 8. The court finds the *City National Bank* case most closely analogous to the present facts.

In *City National Bank*, the court stated that the issue before it was "whether a landowner seeking damages for a taking of his property must take into account existing state and county regulatory restrictions concerning limerock mining when valuing the property prior to the date on which the [federal government] denied a permit necessary to develop the

property for mining." 33 Fed. Cl. at 225. The court noted that the plaintiff possessed a "compensable property interest." *Id.* at 232 n.12. The court did not reach a conclusion on the issue of valuation and stated that if the defendant could establish that the plaintiff could not obtain a permit to mine limerock, "plaintiff's takings claim must fail, because there would be no diminution in the value of the property as of the date of the alleged taking attributable to actions of the Federal Government." 33 Fed. Cl. at 233. In the court's next decision in *City National Bank*, the court found that,"prior to the [federal government's] permit denial, plaintiff could not mine limerock." *City Nat'l Bank v. United States*, 33 Fed. Cl. 759, 764 (1995). Thus, the federal government's denial of the permit, "which admittedly disabled plaintiff from mining limerock, did not affect the value of the property." *Id.* The court granted defendant's motion for summary judgment because "ruling that plaintiff cannot establish the value of his property for mining limerock as of the date of taking forecloses any monetary recovery." *Id. at 764 n.5.* The court's discussion of the effect of local regulations, and specifically plaintiff's inability to mine limerock under local regulations, on plaintiff's taking claim pertained only to the valuation of plaintiff's property interest. See *id.* ("The court notes that this order solely addresses the issue of valuation.").

The other cases cited by defendant address whether the claimant possessed a property interest. In *Willow River Power Co.*, the Supreme Court stated that the issue before the court was whether a property right existed. See 324 U.S. at 502-03 ("We cannot start the process of decision by calling such a claim as we have here a 'property right'; whether it is a property right is

really the question to be answered."). In holding that no property right existed, the Court stated that "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them." *Id.* at 502, 511.

In *Plantation Landing Resort*, the court found that, because the plaintiff did not possess a "compensable interest" with respect to land below the mean high water mark, it could not proceed with a takings claim with respect to that land. 30 Fed. Cl. at 68. Defendant here reads the requirement that a claimant have a "compensable property interest" into the court's statement that, "by not renewing the permit, plaintiff extinguished its compensable interest." See Def.'s Br. at 29 (quoting *Plantation Landing Resort* as support for the proposition that "a plaintiff must establish the existence of a compensable property interest"). The court's discussion, the facts of the case, and Louisiana law demonstrate, however, that the court required that plaintiff possess a property interest, not a "compensable property interest."

In setting out the legal standard for a takings claim, the court in *Plantation Landing Resort* stated that "before a party can recover just compensation under the Fifth Amendment for a taking . . . it must establish a compensable property interest." 30 Fed. Cl. at 67. The next sentence of the court's opinion reads, "'It is clear that only the owner of the property at the time of the taking is entitled to be compensated for the taking.'" *Id.* (quoting *Lacey v. United States*, 595 F.2d 614, 619, 219 Ct. Cl. 551 (Ct. Cl. 1979)). The court thus equated a "compensable property interest" with property ownership and found that the plaintiff did not own the property alleged to have been taken. Under Louisiana

law, it appears that title to land passes to the state when the land erodes and navigable water covers it. See La. Civ. Code Ann. art. 450 (West 1980) ("Public things that belong to the state are . . . bottoms of natural navigable water bodies . . . ."); La. Rev. Stat. Ann. § 9:1151 (West 2004) (referring to a "change" in "ownership" of land or water bottoms as a result of water changing its course or eroding land and setting out the obligation of the "new owner," including the state of Louisiana, with respect to already existing mineral leases). The original landowner may reclaim the land by obtaining a permit to do so. La. Rev. Stat. Ann. § 41:1702 (West 2004). Thus, in *Plantation Landing Resort*, the state owned the property alleged to have been taken and the plaintiff had no property interest in that land.

In *Hill*, the court concluded that because the plaintiff "had no arguably vested property right to sell the animal parts when he received them[,] . . . he has lost no right for which he can claim he is owed compensation." 896 F. Supp. at 1063. The court noted that the plaintiff could have sold the animal parts if he had obtained a permit. *Id.* Had plaintiff possessed a permit, he would have had a vested property right to sell the animal parts. However, plaintiff's lack of a permit precluded a finding that the plaintiff possessed a property interest.

The court believes that, in this case, defendant's argument regarding plaintiff's possession, or lack thereof, of state and local permission to mine is best characterized as a damages argument. Indeed, in defendant's post-trial response brief, defendant clarified that it is not arguing that plaintiff's property interest has been voided by the lack of permits (or that

plaintiff's Lease has been breached), but that the lack of permits renders plaintiff's property interest uncompensable. Def.'s Resp. Br. at 31-32. The trial, and this opinion, are limited to the issue of liability.

4. Whether Plaintiff's Lease is Subject to the Landfill

Defendant argues that "plaintiff acquired its property interest subject to the landfill," and, "to the extent the landfill now prevents plaintiff from mining sand and gravel in the AIC, plaintiff has consented to that restriction on its property interest." Def.'s Br. at 34. Defendant states that the Landfill was in existence when plaintiff acquired the Lease and that the Landfill and plaintiff's sand and gravel mining operations were coordinated enterprises. *Id.* at 34-36. Defendant contends, based on plaintiff's acquiescence to the deposition of refuse on a portion of plaintiff's leasehold, that plaintiff "allowed a nuisance to be created upon its own property" and "allowed the nuisance to continue and to grow on sand and gravel over which [plaintiff] had possession and control." *Id.* at 37.[9] Defendant argues that plaintiff's conduct contributed to plaintiff's loss of sand and gravel, estops plaintiff from claiming a taking and waives plaintiff's right to object to state-imposed restrictions on the closure of municipal landfills. *Id.* at 40-41.

This argument appears to be presented for the first time in defendant's post-trial briefing. Although plaintiff raised no objection to defendant's argument, the court addresses the propriety of raising a new legal argument in post-trial briefing. Rule 15(b) of the Rules of the United States Court of Federal Claims states:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

RCFC 15(b). Rule 15(b) is to be "liberally construed." *Tucker v. United States*, 8 Cl. Ct. 575, 586 (1985); see also *Laningham v. United States*, 5 Cl. Ct. 146, 156 (1984) ("The courts have generally accorded Rule 15(b) a liberal construction, so as to enable controversies to be tried on the merits."). "An absolute minimum requirement before Rule 15(b) can be invoked after trial has been that evidence must have been introduced at trial pertaining to the factual issue(s) implicit in the new claim." *Laningham*, 5 Cl. Ct. at 156. This court's predecessor has found that the substantially similar prior version of Rule 15(b) "allowed the court to treat the pleadings as though amended in order to conform to the proof" where a defense was not affirmatively plead, a procedure preferred by the prior version of Rule 8(c), but was "effectively tried with mutual consent of the parties." *Technical Dev. Corp. v. United States*, 202 Ct. Cl. 237, 243 (1973); see RCFC 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel, . . . waiver, and any other matter constituting an avoidance or affirmative defense.").

The court finds that the defense that plaintiff acquired its Lease subject to the Landfill was tried by the implied consent of the parties. Evidence regarding the factual predicate of the defense was presented at trial. Defendant's failure to make a motion to amend its pleadings to conform to the evidence does not affect the result of the trial on this issue.

Plaintiff contests each of defendant's arguments. Pl.'s Resp. Br. at 16-19. Plaintiff's primary argument is that plaintiff did not know that hazardous material was being dumped at the Landfill and "mere knowledge that waste of some kind is deposited in the landfill does not rise to perpetrating or allowing a continuing nuisance." Pl.'s Resp. Br. at 19. Plaintiff states that "at no time did plaintiff have any control or ownership interest in the landfill operation" and that its Lease "did not grant any rights or responsibilities in the landfill operation." *Id.* at 18-19. Plaintiff adds that "even if plaintiff had some knowledge of hazardous materials being deposited at a landfill it has no control over, defendant has not cited any law to suggest that this knowledge somehow acts to waive plaintiff's constitutional rights." *Id.* at 19. Plaintiff also argues that it did not participate in the Landfill operation. *Id.* at 16.

While the court heard the testimony of thirteen witnesses, it was the testimony of Edward W. Evatz, Jr., the current president of John R. Sand & Gravel Company, Tr. at 355:8-356:1, that proved to be the most illuminating on the issue of plaintiff's relation to the Landfill. Mr. Evatz testified that when the Lease was entered into, in 1969, the Landfill already existed on the leasehold property, Tr. at 469:13-17, and that, at that time, his father was aware of the Landfill operation, Tr. at 470:4-7. Additionally, when Mr. Evatz was first on

the leasehold property in 1970, Tr. at 468:3-4, he was aware of the Landfill operation because his father had told him about it, Tr. at 470:8-17.

Although Mr. Evatz testified that there were no informal agreements between John R. Sand and Russell Parrish, Tr. at 470:18-25, the evidence indicates that John R. Sand and the Landfill operation cooperated with each other. Mr. Evatz testified that both Russell Parrish and Eugene Parrish, his son, Tr. at 471:17, alerted Mr. Evatz to areas of the Landfill property that might be good for sand and gravel mining. Tr. at 471:2-8. When so alerted, Mr. Evatz would send John R. Sand's trucks to the area indicated and the Parrish operation would load John R. Sand's trucks with the sand and gravel. Tr. at 471:10-15.

This mutually beneficial arrangement is characterized by Mr. Evatz's testimony that "on different occasions" Mr. Parrish "would come by and say, hey, we found some . . . good gravel, you want me to load your trucks up? And I'd say, sure. So we'd send the trucks back to wherever he found it, and they'd load the trucks up and that'd free up a crane operator." Tr. at 471:10-15. Specifically, Mr. Evatz agreed that this arrangement was a "good deal" because it "freed up [a crane] operator" for plaintiff. Tr. at 478:1-8. Mr. Evatz testified that from 1972-1976, John R. Sand was mining to the east of the Landfill, Tr. at 373:15-21, 477:14-478:1; see also PX 59 (Map indicating locations and time frames of John R. Sand's mining activities), and that the goal was to get the gravel to the east of the Landfill out of the ground before the Landfill expanded to the eastern lot line, Tr. at 375:3-8, 478:1-3. As John R. Sand dug out the gravel to the east of the Landfill, the Landfill operators "could just dump the garbage in the

hole that [John R. Sand] produced." Tr. at 375:3-8. Mr. Evatz further testified that, in 1974, John R. Sand mined sand and gravel in an area that was "near or . . . in" an area that later became a drum disposal area. Tr. at 551:19-552:18; PX 59 (Map indicating locations and time frames of John R. Sand's mining activities).

Plaintiff allowed the Landfill operation to continue on plaintiff's leasehold despite plaintiff's own understanding of its Lease that John R. Sand was "allowed to mine the entire property," Tr. at 364:4-8, and that John R. Sand's right to mine the property is exclusive in that it would preclude any other uses of the property, Tr. at 365:1-13. Plaintiff, in fact, successfully asserted this understanding of the Lease in litigation with County Transfer Stations, Inc. County Transfer Stations sued John R. Sand for interfering with its business. *County Transfer Stations, Inc. v. John R. Sand & Gravel Co.*, 2003 Mich. App. LEXIS 2810, No. 236611, 2003 WL 22495581, at *2 (Mich. Ct. App. Nov. 4, 2003). The Michigan court found that County Transfer Stations' "use and ownership of its property was clearly subject to [John R. Sand's] mining lease." 2003 Mich. App. LEXIS 2810, [WL] at *3. The court further stated that John R. Sand had no obligation to accommodate County Transfer Stations' business. *Id.* John R. Sand, likewise, had no obligation to accommodate the Metamora Landfill operation, yet the evidence clearly shows that it did so. John R. Sand both allowed the Landfill to operate on the northern portion of its leasehold property and cooperated with the Landfill operation to its own benefit.

Mr. Evatz testified that he saw trucks dumping barrels into the Landfill on two occasions in the 1970s. Tr. at 479:22-480:13, 1362:21-1363:3. When the state

began investigating the drums, Mr. Evatz met with Lt. Gregory Eagle and pointed out areas where drums had been buried. Tr. at 483:9-17 (Testimony of Mr. Evatz). The Michigan Department of Natural Resources[10] estimated that "as many as 35,800 drums could be buried" at the site. DX 71 (Magnetometer Survey, supra, at 6). These drums were buried on the site from approximately 1966 to the mid- to late-1970s. See DX 103, at 003978081, 0039806 (Parrish Deposition, supra, stating that the Landfill began accepting drums in 1966 and accepted them until Eugene Parrish took control of the facility in 1974). Mr. Evatz testified that between 1970 and 1985 he was at the leasehold site on a daily basis. Tr. at 379:16-23; see also Tr. at 1364:19-22 (Testimony of Mr. Evatz, stating that he was at the leasehold site "most of the time" in the 1970-1985 time period). Mr. Evatz was thus at the leasehold site on a daily basis for approximately four of the approximately eight years when drums were being buried at the site. Having had the opportunity to observe the demeanor of Mr. Evatz and, given his testimony demonstrating his subsequent ability to identify areas where drums were buried, Tr. at 483:16-17, the court finds that it strains credulity that Mr. Evatz observed trucks dumping barrels on only the two occasions to which he testified. Whether Mr. Evatz observed the dumping of barrels once, twice, or many times, however, John R. Sand's regular cooperation in activities to develop the Landfill provides a sufficient basis for charging plaintiff with knowledge of, acquiescence in, and cooperation with an activity occurring on its leasehold that could potentially interfere with its leasehold rights.

Plaintiff acquired its Lease with full knowledge that a landfill existed on the northern portion of its

leasehold. Plaintiff's sand and gravel mining business cooperated with the Landfill operation. Under plaintiff's Lease, plaintiff could have shut down the Landfill operation at any time, but did not do so.

Defendant cites *Chancellor Manor v. United States*, 331 F.3d 891, 905 (Fed. Cir. 2003), and *Texaco, Inc. v. Short*, 454 U.S. 516, 530, 70 L. Ed. 2d 738, 102 S. Ct. 781 (1982), to support the proposition that "plaintiff should [be] barred from seeking compensation for 'lost' sand and gravel when [plaintiff's] own conduct, both directly and indirectly, contributed to the loss of that sand and gravel." Def.'s Br. at 40. *Chancellor Manor* was a regulatory taking case in which the Federal Circuit applied the analysis of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). *Chancellor Manor*, 331 F.3d at 901, 903. Plaintiffs argued that they did not cause the problem that the legislation that was the alleged source of the taking sought to address, so it would be unfair for them to bear the burden of solving the problem. *Id.* at 905. Although the court did not have a sufficient record before it to render a decision on this issue, the court did state that "it is pertinent whether the party seeking compensation has created or contributed to the problem the government seeks to solve." *Id.* While *Chancellor Manor* was a regulatory takings case, the court's comment regarding whether the party seeking compensation created or contributed to the problem addressed by the regulation occurred in a larger discussion of the character of the government action factor of the Penn Central analysis. *Id.* at 904-05. In a physical takings case, "'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is

determinative." *Loretto*, 458 U.S. at 426. Thus, in a physical takings case, whether the party seeking compensation has created or contributed to the problem the government seeks to solve by physically occupying the claimant's property is relevant to the takings analysis. In this case, John R. Sand's own actions (allowing the Landfill operation to continue on its property and cooperating with the Landfill operation) contributed to the problem (a landfill encompassing a hazardous waste site) that the government sought to solve by remediating the site and, in the process of remediation, excluding plaintiff from a portion of its leasehold.[11]

In addition to *Chancellor Manor*, two Federal Circuit cases in which property was taken during the investigation and remediation of a hazardous waste site are instructive by contrast. In *Hendler v. United States*, owners of property near a hazardous waste site brought a takings claim against the federal government for the installation and monitoring of groundwater monitoring wells on their property. 952 F.2d 1364, 1369-70 (Fed. Cir. 1991). The Federal Circuit held that the government physically took the owners' property. *Id.* at 1377. There is no indication in any of the trial court or appellate court decisions that the property owners contributed in any way to the creation of the hazardous waste site. See, e.g., *Hendler v. United States*, 175 F.3d 1374, 1383 (Fed. Cir. 1999) (stating that the owners of the hazardous site, the State of California and users of the site were held liable for clean-up costs); *Hendler v. United States*, 36 Fed. Cl. 574, 576-77 (1996) (stating that the *Hendler* owners first acquired the neighboring property in 1960 and "planned to hold the property until economic conditions favored commercial development").

McKay v. United States, 199 F.3d 1376 (Fed. Cir. 1999), is "factually similar" to *Hendler*. 199 F.3d at 1381. In *McKay*, the plaintiffs owned a mineral estate and the government owned the overlying surface rights. *Id.* at 1378. The overlying estate was designated a "Hazardous Substance Site" and the government installed groundwater monitoring wells that extended into the plaintiffs' mineral estate without the plaintiffs' consent. *Id.* The Federal Circuit found that the trial court's granting of "summary judgment for the government of no liability was not warranted." *Id.* at 1382. As in *Hendler*, there was no indication that the plaintiffs contributed in any way to the creation of the hazardous waste site. See *Id.* at 1378 (stating that the Department of Energy sprayed waste onto the overlying estate and that the Department of Energy, EPA, and the Colorado Department of Public Health and Environment entered into a consent decree to investigate and remediate the site).

In both *Hendler* and *McKay*, innocent landowners were able to recover where their land was taken in order to investigate and monitor a neighboring (Hendler) or contiguous overlying (McKay) hazardous waste site. That is not the case here. John R. Sand permitted the Landfill to exist on its own leasehold, coordinated landfilling activities with the Landfill operators, and observed barrels containing hazardous materials being dumped on the leasehold property. Even if, as plaintiff argues in post-trial briefing but did not directly testify to, plaintiff did not know that the barrels contained hazardous materials, Pl.'s Resp. Br. at 19 (citing Mr. Evatz' testimony that he "couldn't see what was inside [drums being dumped on the leasehold]," Tr. at 480:4-6), plaintiff's participation in

the Landfill operation and acquiescence in its presence on its leasehold preclude a finding that plaintiff is an innocent landowner in the position of the plaintiffs in *Hendler* and *McKay*. Had the plaintiffs in *Hendler* and *McKay* not prevailed, they would have been forced to bear a burden that was neither created nor acquiesced in by them. Here, if plaintiff prevails, plaintiff would shift a burden that plaintiff participated in creating onto the public as a whole.

Justice and fairness do not require that the community at large bear the burden of plaintiff's inability to mine a portion of its leasehold when plaintiff contributed to the circumstances causing the loss of the right to mine. In *Agins v. Tiburon*, the Supreme Court stated that "the determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980). The Supreme Court has also stated that the Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49; see also *Am. Pelagic Fishing Co.*, 379 F.3d at 1371 ("The purpose of [the Takings Clause] is to prevent 'Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (quoting *Penn Central Transp. Co.*, 438 U.S. at 123)). Plaintiff's contribution to the creation of a landfill containing a hazardous waste site makes the loss of a portion of plaintiff's property during the remediation of that site a burden which it is fair to allow plaintiff to

bear, rather than shifting plaintiff's loss to the public as a whole. The court finds that fairness and justice do not require compensation to plaintiff in these circumstances.

While the foregoing determination that plaintiff's property interest is noncompensible under equitable principles defeats plaintiff's claim in its entirety, the court, in the interest of judicial economy and efficiency, now addresses the remaining issues disputed at trial. Those issues involve the government's defense based on background principles of state law which would bar plaintiff from mining in the AIC.

B. Whether Background Principles of Michigan Law Prohibit Mining in the Area of Institutional Controls

"If background principles of a state's nuisance and property law prohibit the uses a plaintiff intends, then no taking has occurred." *John R. Sand II*, 60 Fed. Cl. at 239. In *Lucas*, the Supreme Court treated regulations that prohibit all economically beneficial use of land similarly to physical occupations, stating:

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts-by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State

> under its complementary power to abate nuisances that affect the public generally, or otherwise.

505 U.S. at 1029. Thus, the defendant in a takings case bears the burden of identifying the background principles and proving that they apply to the factual circumstances of the case. *Id.* at 1031.

In applying the background principles exception, *Lucas* instructed that a court must look at the intended use of land and the land in its current condition to determine whether background principles would prohibit the intended use. See 505 U.S. at 1031 ("[The defendant] must identify background principles of nuisance and property law that prohibit the uses [the plaintiff] now intends in the circumstances in which the property is presently found." (emphasis added)). The Court further stated that the "inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities." *Id.* at 1030-31.

Not all background principles of state law are robust enough to fit within the Lucas background principles exception. See, e.g., *K & K Constr., Inc. v. Dep't of Natural Res.*, 217 Mich. App. 56, 551 N.W.2d 413, 417 (Mich. Ct. App. 1996) (finding that a state constitutional provision declaring natural resource conservation "'to be of paramount public concern'" and "the generalized invocation of public interests in the . . . Legislature's declarations in . . . the Michigan Environmental Protection Act do not constitute background principles of nuisance and property law

sufficient to prohibit the use of plaintiffs' land without just compensation" (citations omitted)), *rev'd on other grounds*, 456 Mich. 570, 575 N.W.2d 531 (Mich. 1998).

1. Applicable Michigan Law

Common law nuisance, as defined by Michigan law, encompasses activity causing significant harm to common rights enjoyed by the public, or significant interference with rights of private property owners to the use and enjoyment of their land. A long line of Michigan cases teaches that activities proscribed by laws enacted to protect the public health, safety, and welfare are presumed to cause significant harm to the public and are thus presumed to be nuisances. Accordingly, the court next examines the background principles of Michigan nuisance law.

Under Michigan law, a nuisance may either be private[12] or public. To prevail under theories of either private or public nuisance, "a plaintiff must prove significant harm resulting from the defendant's unreasonable interference with the use or enjoyment of property." *City of Jackson v. Thompson-McCully Co.*, 239 Mich. App. 482, 608 N.W.2d 531, 537 (Mich. Ct. App. 2000); see also Restatement (Second) of Torts § 821F (1979) ("There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose."). Where the injury has not yet occurred, the nuisance is anticipatory. See *Thompson-McCully Co.*, 608 N.W.2d at 537 (referring to an "anticipatory nuisance" as one where the harm has not yet occurred and is only "threatened or anticipated" (internal citation omitted)). A party claiming that an anticipatory

nuisance[13] exists must show that the occurrence of injury or harm is more than conjectural:

> Equity will not enjoin an injury which is merely anticipated nor interfere where an apprehended nuisance is doubtful, contingent, conjectural or problematical. A bare possibility of nuisance or a mere fear or apprehension that injury will result is not enough. On the other hand, an injunction may issue to prevent a threatened or anticipated nuisance which will necessarily result from the contemplated act, where the nuisance is a practically certain or strongly probable result or a natural or inevitable consequence.

Falkner v. Brookfield, 368 Mich. 17, 117 N.W.2d 125, 128 (Mich. 1962); see also *Plassey v. S. Loewenstein & Son*, 330 Mich. 525, 48 N.W.2d 126, 128 (Mich. 1951) ("'Equity, as a rule, will not interfere in advance of the creation of a nuisance where the injury is doubtful or contingent, and anticipated merely from the use to which the property is to be put.'" (quoting *Briggs v. City of Grand Rapids*, 261 Mich. 11, 245 N.W. 555, 556 (Mich. 1932) (internal citations omitted))); *Foster v. County of Genesee*, 329 Mich. 665, 46 N.W.2d 426, 429 (Mich. 1951) (stating that evidence that a "proposed use of property may constitute a possible threatened nuisance . . . does not entitle plaintiffs to an injunction" because "equity will not interfere in advance of creation of nuisance, where injury is doubtful or contingent, and anticipated merely from use to which property is to be put"); *Thompson-McCully Co.*, 608 N.W.2d at 537

("Equity will not interfere where injury from an anticipated nuisance is doubtful or contingent.").

The Michigan Supreme Court recognized in *Adkins v. Thomas Solvent Co.* that courts must balance several factors in awarding injunctive relief for anticipatory nuisances. See 440 Mich. 293, 487 N.W.2d 715, 725 (Mich. 1992) (acknowledging "that different considerations apply to the remedies appropriate, and that injunctive relief is sometimes available when a tort is merely threatened"); cf. *Hayes-Albion v. Kuberski*, 421 Mich. 170, 364 N.W.2d 609, 617-18 (Mich. 1984) (noting the importance of balancing factors for injunctions). The seriousness of the anticipated harm must be weighed against the likelihood that it will occur:

> The seriousness and imminence of the threat are . . . independent of each other, since a serious harm may be only remotely likely to materialize and a trivial harm may be quite imminent. Yet the two elements must be considered together . . . . The more serious the impending harm, the less justification there is for taking the chances that are involved in pronouncing the harm too remote.

Restatement (Second) of Torts § 933 cmt. b (1979); see also *Hayes-Albion*, 364 N.W.2d at 618 n.11 (citing Restatement (Second) of Torts § § 933, 936, and 942 for guidance in the analysis of a tort remedy). The law of anticipatory nuisance does not require absolute certainty where the harm is sufficiently serious.

"A public nuisance is an unreasonable interference with a common right enjoyed by the general public." *Cloverleaf Car Co. v. Phillips Petroleum Co.*, 213 Mich. App. 186, 540 N.W.2d 297, 300 (Mich. Ct. App. 1995). While Michigan law does not explicitly define what constitutes a "common right enjoyed by the general public," the language of *Cloverleaf Car Co.* mirrors the Restatement (Second) of Torts. See Restatement (Second) of Torts § 821B(1) (1979) ("A public nuisance is an unreasonable interference with a right common to the general public."). The Restatement (Second) of Torts defines a "public right" to be "one common to all members of the general public. It is collective in nature ...." *Id.* § 821B cmt. g.

Under Michigan law, "unreasonable interference" with a public right "includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights." *Cloverleaf Car Co.* 540 N.W.2d at 300-301 (finding a public nuisance where gasoline spread from a tank system into groundwater). The right to be free from groundwater contamination and the right to be free from explosion and fire hazards, for example, have long been recognized as public rights under Michigan nuisance law.

The possibility that groundwater contamination could be a nuisance has been recognized by the Michigan courts at least since the late 1800s. See, e.g., *Upjohn v. Bd. of Health*, 46 Mich. 542, 9 N.W. 845, 845 (Mich. 1881) (considering whether the proposed use of adjacent land as a cemetery would "be detrimental to

the health of the people of the village; [would] corrupt the water of their wells and render it unfit for use, and for these reasons become a public nuisance"). The Michigan Supreme Court's statement that "the pollution of groundwater pollution may constitute a public or private nuisance," *Adkins*, 487 N.W.2d at 720 (citing Restatement (Second) of Torts § 832), recognizes that the right to be free from groundwater contamination is a public right.

The Michigan Supreme Court identified fire hazards as a nuisance in *Buckeye Union Fire Insurance Co. v. Michigan*: "the very nature of the nuisance . . . [of] a fire hazard" is that "sheer chance or an act of God (lightning) would convert the peril to the neighboring land into a destructive force." 383 Mich. 630, 178 N.W.2d 476, 480 (Mich. 1970). The Restatement (Second) of Torts also states that "a fire hazard to one adjoining landowner may be a public nuisance because of the danger of a conflagration." Restatement (Second) of Torts § 821B cmt. g (1979). Thus the right to be free from explosion and fire hazards is also a public right under Michigan nuisance law.

The "proscribed by law" definition of public nuisance in *Cloverleaf Car Co.*, 540 N.W.2d at 300, encapsulates a long line of Michigan decisions stating that an activity may be found to be a nuisance if it violates a law. See *Att'y Gen. ex rel. Mich. Bd. of Optometry v. Peterson*, 381 Mich. 445, 164 N.W.2d 43, 53 (Mich. 1969) ("At common law, acts in violation of law constitute a public nuisance.");[14] *Township of Garfield v. Young*, 348 Mich. 337, 82 N.W.2d 876, 878 (Mich. 1957) (suggesting that a statute could "denominate [an] activity a nuisance per se"); *Mich. State Chiropractic Ass'n v. Kelley*, 79 Mich. App. 789, 262 N.W.2d 676, 677 (Mich. Ct. App. 1977)

(stating that an "unlawful activity" is a public nuisance). However, other Michigan cases state that the bare violation of a statute is not enough to declare an activity to be a nuisance. See *Adkins*, 487 N.W.2d at 725 ("Defendant's business is a lawful business, and the fact that violations of the law may have occurred on the property does not make the conduct of the business a nuisance in fact."). "Factual support [is] required to prove nuisance; illegal conduct alone [is] not enough." *Id.* at 725 n.31; see also *Conway v. Gampel*, 235 Mich. 511, 209 N.W. 562, 563 (Mich. 1926) (stating that, even in a case where an activity is a nuisance per se, "a court of equity requires evidence of the fact of actual nuisance before it will enjoin"). *Adkins*, however, was decided on a theory of private nuisance in which no illegal conduct was alleged. See 487 N.W.2d at 721 ("The crux of plaintiff's complaint is that publicity concerning the contamination of ground water in the area (although concededly not their ground water) caused diminution in the value of the plaintiff's property."). *Conway* awarded injunctive relief to private landowners on grounds of both per se and factual nuisance. See 209 N.W. at 563 (noting that "if plaintiffs have established right to injunctive relief on [either allegations of illegal conduct or factual nuisance], the [lower court] must be affirmed."). But where a "statute enacted to preserve public health, safety and welfare" is violated, Michigan courts apply a per se rule. See, e.g., *Peterson*, 164 N.W.2d at 53 ("Harm to the public is presumed to flow from the violation of a valid statute enacted to preserve public health, safety and welfare.").

The public health and safety laws at issue in this case are contained in the Michigan Natural Resources

and Environmental Protection Act (NREPA). Mich. Comp. Laws Ann. § § 324.101-.99904 (West 1998).[15] In 1995 NREPA, as explained in the Preamble to section 324.101, effectively consolidated environmental protection statutes and created the Department of Environmental Quality, with jurisdiction over enforcement of pollution control statutes, § 324.99903. Part 201 of NREPA governs environmental cleanup. Part 31 addresses protection of Michigan's water resources.

Part 201 of NREPA: Part 201 of NREPA addresses environmental remediation generally. § § 324.20101-42. Section 324.20107a, in particular, requires that remedial measures be exercised with "due care . . . in a manner that protects public health and safety":

> (1) A person who owns or operates property that he or she has knowledge is a facility shall do all of the following with respect to hazardous substances at the facility:
>
> (a) Undertake measures as are necessary to prevent exacerbation of the existing contamination.
>
> (b) Exercise due care by undertaking response activity necessary to mitigate unacceptable exposure to hazardous substances, mitigate fire and explosion hazards due to hazardous substances, and allow for the intended use of the facility in a manner that protects the public health and safety.

§ 324.20107a(1)(a)-(b) (emphasis added).

A "facility" is defined as "any area, place, or property where a hazardous substance in excess of the concentrations which satisfy the requirements of section 20120a(1)(a) or (17) or the cleanup criteria for unrestricted residential use under part 213 has been released, deposited, disposed of, or otherwise comes to be located." § 324.20101(1)(o). The court in *In re Approximately Forty Acres in Tallmadge Township v. Department of Natural Resources* found that the Michigan legislature intended to define "facility" broadly. 457 Mich. 885, 223 Mich. App. 454, 566 N.W.2d 652, 656 (Mich. Ct. App. 1997). In applying a broad definition of "facility" to a portion of NREPA that allowed a lien to be placed on a "facility," *Id.* at 654, the court stated that "if hazardous substances are located on a part of the property, a lien may be placed on the entire, legally described, parcel of land." *Id.* at 656. The court stated, however, that "courts must analyze each situation case by case". *Id.* On the basis of the following evidence, the court found an entire forty-acre parcel to be a "facility:"

> The hearing testimony indicated that the soil that had been contaminated had been moved to only one corner of the parcel. However, the testimony also indicated that there was no way to know if the subsurface soil was contaminated because the area is under landfill. Also, the ground water under twenty to thirty acres of the parcel was contaminated.

Id. at 656-57. Thus, an area larger than that which is contaminated may be a "facility."

An "owner" is defined as "a person who owns a facility." Mich. Comp. Laws Ann. § 324.20101(1)(z). An "operator" is defined as "a person who is in control of or responsible for the operation of a facility." § 324.20101(1)(y). In interpreting "operator," the Michigan Court of Appeals has stated that "in order for operator status to apply, a defendant must have had authority to control the operations or decisions involving the disposal of the hazardous substance, or assumed responsibility or control over the disposition of the hazardous substance." *Farm Bureau Mut. Ins. Co. v. Porter & Heckman, Inc.*, 220 Mich. App. 627, 560 N.W.2d 367, 378-79 (Mich. Ct. App. 1996). The court also stated that "absent either actual ownership or possession of a facility, a nexus must exist between the defendant and the facility by which the defendant has assumed responsibility for, or managed, or had authority to control, or controlled, the operations involving the disposition or handling of the hazardous substance." *Id.* at 379.

Michigan law defines a "hazardous substance" with reference to, *inter alia*, "hazardous waste as defined in part 111." Mich. Comp. Laws Ann. § 324.20101(1)(t)(iii). Part 111 defines "hazardous waste" as

> waste or a combination of waste and other discarded material including solid, liquid, semisolid, or contained gaseous material that because of its quantity, quality, concentration, or physical, chemical, or infectious characteristics . . . may pose a substantial present or potential hazard to

> human health or the environment if improperly treated, stored, transported, disposed of, or otherwise managed.

§ 324.11103(3).

"Exacerbation of . . . existing contamination" prohibited by § 324.20107a(1)(a) is defined as owner or operator activity causing either the migration of "existing contamination . . . beyond the boundaries of the property which is the source of the release at levels above cleanup criteria specified in section 20120a(1)(a) [the residential drinking water protection criteria],"[16] or "[a] change in facility conditions that increases response costs." § 324.20101(1)(n).

Section 324.20107a(1)(b) requires owners or operators to "exercise due care by undertaking response activities necessary to mitigate unacceptable exposure to hazardous substances, mitigate fire and explosion hazards due to hazardous substances, and allow for the intended use of the facility in a manner that protects the public health and safety." § 324.20107a(1)(b). "Response activity" is defined as "evaluation, interim response activity, remedial action, demolition, or the taking of other actions necessary to protect the public health, safety, or welfare, or the environment or the natural resources." § 324.20101(1)(ee). "Remedial action," one of the many listed response activities, "includes, but is not limited to, cleanup, removal, containment, isolation, destruction, or treatment of a hazardous substance released or threatened to be released into the environment . . . or the taking of other actions that may be necessary to prevent, minimize, or mitigate injury to

the public health, safety, or welfare, or to the environment." § 324.20101(1)(cc).

Section 324.20107a is a public health, safety and welfare statute because "it is the purpose of [Part 201] to provide for appropriate response activity to eliminate unacceptable risks to public health, safety, or welfare . . . from environmental contamination at facilities within the state." § 324.20102(c). Thus, "harm to the public is presumed to flow from the violation of [section 324.20107a,] a valid statute enacted to preserve public health, safety and welfare." *Peterson*, 164 N.W.2d at 53; see also *People v. McKendrick*, 468 N.W.2d 903, 909, 188 Mich. App. 128 (Mich. Ct. App. 1991) (quoting *Peterson*, 164 N.W.2d at 53, and noting that such a violation "is characterized as a public nuisance").

Part 31 of NREPA: Part 31 of NREPA addresses water resources protection. Mich. Comp. Laws Ann. § § 324.3101-33. At the time of the alleged taking, in May 1998, section 324.3109 prohibited the discharge of potentially injurious substances into the groundwater:

> (1) A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following:
>
> (a) To the public health, safety, or welfare.
>
> . . . .
>
> (4) A violation of this section is prima facie evidence of the existence of a public nuisance and in addition to the remedies provided for in this part may be abated

> according to law in an action brought by the attorney general in a court of competent jurisdiction.

§ 324.3109(1), (4); see also § 324.3101(y) ("'Waters of the state' means groundwaters . . . .").

Section 324.3109 provides that a violation of the section is "prima facie evidence of the existence of a public nuisance." § 324.3109(4). This means that once the statute has been violated, there is a rebuttable presumption that a public nuisance exists, which the party in violation has the burden of disproving. See *State Farm Fire & Cas. Co. v. Couvier*, 227 Mich. App. 271, 575 N.W.2d 331, 333 (Mich. Ct. App. 1998) (explaining the term "prima facie evidence" as "a rebuttable presumption that [the defendant] has the burden of disproving with evidence to the contrary," in a situation where a statute deemed an act "prima facie evidence of a violation" of that statute); see also *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Township*, 259 Mich. App. 315, 675 N.W.2d 271, 281 (Mich. Ct. App. 2003) ("Prima facie evidence is defined in Black's Law Dictionary (7th ed.) as 'evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.'").

Plaintiff argues that the force of Michigan nuisance law is blunted in this case because "mining is favored by Michigan public policy," Pl.'s Br. at 12, and that mining uncontaminated sand and gravel is not a nuisance per se, public nuisance, or nuisance in fact, *id.* at 15. Defendant responds that "the law is clear that even the carrying out of lawful activities can generate nuisance impacts." Def.'s Br. at 45. Defendant argues that, "in *Goldblatt v. Hempstead*, 369 U.S. 590, 591-93, 8 L. Ed.

2d 130, 82 S. Ct. 987 (1962), no takings liability accrued from the government's placing regulatory restrictions on the operation of a sand and gravel pit when those restrictions were designed to prevent nuisance-like consequences." Def.'s Br. at 45. Plaintiff replies that "the normal circumstances of an activity are entirely relevant as a background principle of property and nuisance law." Pl.'s Resp. Br. at 21-22. Plaintiff adds that several cases discussed by defendant "were all based on the determination that the mining in question would cause a nuisance under normal conditions[] [and] the courts determined that the mining uses when applied to the property as they naturally existed would cause a nuisance." Pl.'s Resp. Br. at 22 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 94 L. Ed. 2d 472, 107 S. Ct. 1232 (1987); *M&J Coal Co. v. United States*, 47 F.3d 1148 (Fed. Cir. 1995); *Rith Energy, Inc. v. United States*, 44 Fed. Cl. 108 (1999)).

Lucas indicates that it is irrelevant to the present inquiry that mining is favored by Michigan public policy and that the business of sand and gravel mining is not a nuisance under Michigan law. In *Lucas*, the Court focused on the application of background principles to the intended use of property "in the circumstances in which the land is presently found." 505 U.S. at 1031 (emphasis added). Even if the general process of mining is not a nuisance under state law, factual circumstances may make mining harmful to others. See Restatement (Second) of Torts § 821A cmt. c (1979) (noting that "for a nuisance to exist, there must be harm to another or the invasion of an interest").

Michigan courts have long recognized the state's broad law police power to abate public nuisances:

> "The police power is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction and abatement by summary proceedings of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; [and] the destruction of decayed or unwholesome food . . . ."

Osborn v. Charlevoix Circuit Judge, 114 Mich. 655, 72 N.W. 982, 985 (Mich. 1897) (quoting *Lawton v. Steele*, 152 U.S. 133, 136, 38 L. Ed. 385, 14 S. Ct. 499 (1894)). [17]

The background principles of Michigan nuisance law give the state police power to abate per se public nuisances caused by the violation of laws enacted to protect the public health, safety, and welfare. The court turns next to the application of these background principles to the facts before it.

2. Whether Michigan Law Could Abate Mining in the Area of Institutional Controls

Applying the standards set out in *Lucas* to the present situation, if the state government could have abated the particular use of property plaintiff intended under state law by physically excluding plaintiff from a portion of plaintiff's leasehold, then no compensation is required.

a. Whether Mining in the AIC Would Adversely Impact the Remediation

Defendant claims that an anticipatory nuisance would occur if plaintiff mined sand and gravel in the AIC because it would "impair the ability of the remedial action to remedy the contaminated groundwater." Def.'s Br. at 56. Part 201 of NREPA addresses environmental remediation. Mich. Comp. Laws Ann. § § 324.20101-42. Section 324.20107a, in particular, imposes a duty on the operator of a facility to exercise due care in remediation of existing contamination and proscribes activity that exacerbates existing contamination. See supra Part II.B.1 (discussing the remedial duty of due care, see § 324.20107a(1)(b), and the prohibition against exacerbating existing contamination, see § 324.20107a(2)). Defendant argues that, because plaintiff's mining in the AIC would exacerbate existing contamination in violation of section 324.20107a, plaintiff's mining in the AIC would be a public nuisance. Def.'s Br. at 76. Before examining whether plaintiff would have violated the statute by mining in the AIC, the court must first decide whether the AIC is a "facility" and whether plaintiff is one "who owns or operates . . . a facility." Mich. Comp. Laws Ann. § 324.20107a(1).

Plaintiff argues that "the uncontaminated sand and gravel within the AIC and outside the cap and not in the [Drum Area 1] soils is not a facility" because "an area without contamination is not a facility." Pl.'s Br. at 21-22. Defendant argues that the AIC is a facility and that plaintiff's construction of the term "facility" is too narrow. Def.'s Resp. Br. at 6-8. Defendant relies on *In re Approximately Forty Acres in Tallmadge Township*. Def.'s Br. at 7-8.

In accordance with the broad reading of "facility" given by the Michigan court in *In re Approximately*

Forty Acres, noted above in Part II.B.1, the court finds that the AIC, in its entirety, is a "facility." The AIC was developed in 1998 with the goal of enclosing an area necessary to construct the Landfill cap and serve as an area of "institutional controls." Tr. at 153:24-154:11 (Testimony of Dr. Campbell). "Institutional controls" are "controls [that] are placed on the property for specific reasons, typically to protect individuals from future exposures, along with ensuring that the property remains in a protective condition." Tr. at 314:5-12 (Testimony of Mr. Williams). After construction of the Landfill cap was completed, the fence enclosing the AIC was moved in 2003 to enclose a smaller area.[18] Tr. at 154:24-155:21 (Testimony of Dr. Campbell). The 2003 fence enclosed an area of land necessary to "protect the integrity of the capping system." Tr. at 155:9-11 (Testimony of Dr. Campbell).

The groundwater in the shallow aquifer beneath the AIC exceeds Michigan drinking water criteria for Contaminants of Concern (COCs).[19] See DX 461b (Map, 2000 Extent of Impacted Groundwater, Shallow Aquifer, Metamora Landfill Site); DX 461c (Map, 1998/1999 Extent of Impacted Groundwater, Shallow Aquifer, Metamora Landfill Site); DX 461f (Map, 1993 Extent of Impacted Groundwater, Shallow Aquifer, Metamora Landfill Site).[20] Because the current fence encloses the hazardous substances and an area necessary to protect the AIC and individuals who may be exposed to the hazardous substances within it, and because groundwater contamination exists beneath the AIC, the court finds that the AIC is a "facility." With respect to the area of land located between the 1998 and 2003 fence locations, the court finds that this area is not a facility.[21]

Having found that the AIC is a "facility," the court examines whether plaintiff is an "owner or operator" with "knowledge" that its property is a facility. See Mich. Comp. Laws Ann. § 324.20107a(1)(a)-(b) (requiring "[a] person who owns or operates a property that he or she has knowledge is a facility to prevent exacerbation of [] existing contamination," and imposing a duty to exercise "due care by undertaking response activity necessary to mitigate unacceptable exposure to hazardous substances, mitigate fire and explosion hazards due to hazardous substances, and allow for the intended use of the facility in a manner that protects the public health and safety"). Although neither party addressed plaintiff's status as an "owner or operator" with "knowledge" that its property is a "facility," cf. § 324.20107a(1)(a), the court nonetheless addresses these statutory requirements.

Substantial and uncontroverted evidence supports both plaintiff's knowledge of the "facility" status of the AIC and its role as an "operator" of the AIC. The court finds that plaintiff "operates" the facility because plaintiff "had authority to control . . . the operations involving the disposition or handling of the hazardous substance." *Farm Bureau Mut. Ins. Co.*, 560 N.W.2d at 379. The court bases this conclusion on the fact that plaintiff's Lease grants to plaintiff the leasehold area, including the AIC, for plaintiff's "exclusive use." See JX 1 (Lease ¶ 1). John R. Sand's understanding of the Lease is that its right to mine the property would preclude any other uses of the property, Tr. at 365:113 (Testimony of Mr. Evatz), an understanding that has been upheld in *County Transfer Stations, Inc. v. John R. Sand & Gravel Co.*, where the court found that John R. Sand had no obligation to accommodate County

Transfer Stations' business, which operated on the leasehold. 2003 Mich. App. LEXIS 2810, No. 236611, 2003 WL 22495581, at *3 (Mich. Ct. App. No v. 4, 2003). John R. Sand, likewise, had no obligation to accommodate the Landfill operation and could have halted the operations of the Landfill at any time. Its "authority to control . . . the operations involving the disposition or handling of the hazardous substance," *Farm Bureau Mut. Ins. Co.*, 560 N.W.2d at 379, renders plaintiff one who "operates" a facility. Furthermore, there can be no dispute that plaintiff "has knowledge [that the AIC] is a facility." Mich. Comp. Laws Ann. § 324.20107a(1). Plaintiff's cooperation with the Landfill operations and the continuous awareness by plaintiff's current president, Mr. Evatz, see Part II.A.4, supra, of events on the property since 1970, are sufficient to charge plaintiff with knowledge of its status as a "facility."

In order to determine whether mining in the AIC would violate John R. Sand's duties as the operator of a facility under Section 324.20107a to exercise due care in remediation and to avoid exacerbating existing contamination, the court reviews evidence regarding the "natural attenuation" remediation program in operation at the Metamora Landfill site.

Natural attenuation, or biodegredation, a process whereby natural processes in the environment "treat the chemicals and reduce their concentration," Tr. at 615:6-12 (Testimony of Mr. Reid), is occurring at the Metamora Landfill site. Tr. at 784:5-23 (Testimony of Dr. Vanderpool); JX 33 (Conceptual Site Model Report, supra, exec. summ. xii). The type of natural attenuation that is occurring at the Metamora Landfill site is biodegradation. Tr. at 784:5-23 (Testimony of Dr.

Vanderpool); JX 33 (Conceptual Site Model Report, supra, exec. summ. xii). In the biodegradation process, microorganisms break down contaminants either directly, by digesting the contaminant, or indirectly, by producing enzymes that break down contaminants, and, at the end of the process, a formerly hazardous chemical is no longer hazardous. Tr. at 784:5-786:15 (Testimony of Dr. Vanderpool).[22] One indicator that biodegradation is occurring at the Metamora Landfill site is the stability of the contaminant plume. Tr. at 801:5-802:19 (Testimony of Dr. Vanderpool). Dr. Vanderpool testified that, when she examined the data in 2000, contamination levels at particular shallow aquifer groundwater monitoring wells were going down and contamination levels decreased as the groundwater moved away from the Landfill. Tr. at 801:18-802:14.

Given the conditions of the site, the question is what would happen if John R. Sand were to mine in the AIC. Dr. Vanderpool testified to a number of hydrogeological effects that could be caused by excavating in the AIC. Tr. at 1326:22-1328:8.[23] Dr. Vanderpool also testified that excavating in the AIC would interrupt the biodegradation process by exposing the biodegradation microbes to oxygen. Tr. at 1329:21-1330:5. She explained that

> the microorganisms that . . . biodegrade the chlorinated hydrocarbons at this site[] don't like oxygen. . . . An excavation has the potential of exposing more . . . of the vadose zone to oxygen, putting that oxygen deeper down, wherever the bottom of the excavation is, so you have the potential of

> interrupting the biodegradation microbes that you're relying on.

Tr. at 1329:22-1330:5. If the biodegradation process is interrupted, the concentration of chemicals will not be reduced to the extent that they are currently being reduced.

COCs at levels exceeding Michigan drinking water criteria already exist in both the shallow and intermediate aquifers. JX 33 (Conceptual Site Model Report, supra, exec. summ. vii). "The extent of the groundwater criteria extends approximately 500 feet from the property boundary . . . . This extent has remained consistent over time . . ." *Id.* (Conceptual Site Model Report, supra, at 40). "The exceedance of [drinking water criteria in the intermediate aquifer] occurs at 1,000 feet downgradient of the Site . . . ." *Id.* (Conceptual Site Model Report, supra, at 52). One effect of biodegradation at the site is that groundwater contamination levels decreased as one moved away from the Landfill. Tr. at 801:4-802:16 (Testimony of Dr. Vanderpool). Digging inhibits the biodegradation process by introducing oxygen into the soil, thus increasing the volume of contaminants. Inhibiting the biodegradation process undoes the remedial effects put in place by the AIC.

Because the court finds that John R. Sand is an operator of a facility and that plaintiff's mining is "an activity undertaken by [a] person who . . . operates [a] property that he or she has knowledge is a facility, " Mich. Comp. Laws Ann. § 324.20107a(1), plaintiff has a duty to "exercise due care," § 324.20107a(1)(b), by taking "remedial action" in the "cleanup, removal, containment, isolation, destruction or treatment of a

hazardous substance released or threatened to be released into the environment," § 324.20101(1)(cc). Because plaintiff's mining would inhibit the "treatment of a hazardous substance released or threatened to be released" and therefore fail to "mitigate injury to the public health, safety, . . . welfare, or . . . environment," the court finds that plaintiff's mining in the AIC would violate section 324.20107a(1). See § 324.20101(1)(cc) (defining "remedial action").

Defendant argues that section 324.20107a is a public health, safety and welfare statute because it was "designed to protect the public health, safety, and welfare," Def.'s Br. at 76 & n.28, and that "under the doctrine set forth in the *Peterson* decision, a violation of that statute would be *presumed* to be a public nuisance." *Id.* at 76. The court agrees with defendant that section 324.20107a is a public health, safety and welfare statute because "it is the purpose of [Part 201] to provide for appropriate response activity to eliminate unacceptable risks to public health, safety, or welfare . . . from environmental contamination at facilities within the state." Mich. Comp. Laws Ann. § 324.20102(c). Thus, "harm to the public is presumed to flow from the violation of [section 324.20107a,] a valid statute enacted to preserve public health, safety and welfare." *Peterson*, 164 N.W.2d at 53; see also *People v. McKendrick*, 188 Mich. App. 128, 468 N.W.2d 903, 909 (Mich. Ct. App. 1991) (quoting *Peterson*, 164 N.W.2d at 53, and noting that such a violation "is characterized as a public nuisance").

Because the court finds that mining in the AIC would violate section 342.20107a by adversely impacting the existing remediation, plaintiff's mining activity would be presumed to be a public nuisance.

Plaintiff was required to rebut the presumption of public harm but failed to do so. In particular, plaintiff presented no evidence that interruption of the biodegradation process would not occur. Thus, the court finds that plaintiff's mining in the AIC would cause a public nuisance by violating plaintiff's obligations under Part 201 of NREPA.

b. Whether Mining in the AIC Would Further Pollute Groundwater

Defendant alleges that plaintiff's mining in the AIC would "further pollute the already-contaminated groundwater." Def.'s Br. at 56. Defendant argues that it is "well established that groundwater pollution constitutes a nuisance," Def.'s Resp. Br. at 28 (citing *White Lake Improvement Ass'n v. City of Whitehall*, 177 N.W.2d 473, 481, 22 Mich. App. 262 (Mich. Ct. App. 1970)), and that "it is not necessary to prove that [groundwater] pollution will contaminate a [residential] well in order to establish a public nuisance," *id.* at 27. Defendant also states that "Adkins does not hold . . . that the state cannot act to abate a nuisance until there is proof that the contamination has reached a well," and that Adkins only addressed whether a private nuisance claim could be based solely on "'unfounded fear.'" Def.'s Br. at 28 (quoting Adkins, 487 N.W.2d at 721). Plaintiff argues that trial evidence demonstrated nothing more than "mining uncontaminated sand and gravel in the AIC may cause a risk that the contamination plume might move," and that this evidence was too "speculative" to support a finding of an anticipatory nuisance. Pl.'s Resp. Br. at 25.

The evidence at trial provided a wealth of hydrogeologic information about the Metamora Landfill

site. The land at the Metamora Landfill site consists of the following hydrogeologic units (starting at the surface of the ground and going down): vadose zone,[24] shallow aquifer, upper till aquitard, intermediate aquifer, lower till aquitard and bedrock aquifer. JX 33 (Conceptual Site Model Report, supra, exec. summ. v). Till lenses also exist at the Metamora Landfill site.[25] See Tr. at 1325:9-10 (Testimony of Dr. Vanderpool, stating that there are "definitely" till lenses at the Metamora Landfill site); see also JX 3, at D0185-86 (E.C. Jordan Co., Site Investigation Final Report 32-33 (Feb. 1986)), stating, in a section on regional hydrology, that "localized zones of perched groundwater exist where clay lenses are found at elevations above the water table"). A till lens, as opposed to a till layer, is a small piece of till that is not horizontally large. Tr. at 1319:22-25 (Testimony of Dr. Vanderpool). Till consists of compacted material, such as silt and clay, that is not very permeable. Tr. at 631:8-12 (Testimony of Mr. Reid). A till "can and usually [does] keep contamination from moving down to the next layer." Tr. at 1320:1314 (Testimony of Dr. Vanderpool); see also Tr. at 813:14-17 (Testimony of Dr. Vanderpool, stating that a till layer is "pretty impermeable").

COCs at levels exceeding Michigan drinking water criteria exist in both the shallow and intermediate aquifers beneath the Metamora Landfill site. JX 33 (Conceptual Site Model Report, supra, exec. summ. vii). "The extent of the groundwater plume [in the shallow aquifer] exceeding Michigan generic residential drinking water criteria extends approximately 500 feet from the property boundary . . . . This extent has remained consistent over time . . . ." *Id.* (Conceptual Site Model Report, supra, at 40). Contaminants have

migrated from the shallow aquifer to the intermediate aquifer through the upper till. *Id.* (Conceptual Site Model Report, supra, exec. summ. vii-viii). "The exceedance of [drinking water criteria in the intermediate aquifer] occurs at 1,000 feet downgradient of the Site . . . ." *Id.* (Conceptual Site Model Report, supra, at 52). Dr. Vanderpool offered two hypotheses regarding why the usually "impermeable" till layer was not able to stop the migration of contamination from the shallow aquifer to the intermediate aquifer: discontinuities (holes) within the upper till and fractures in the upper till. Tr. at 1317:4-1318:8, 1319:6-9.

There is currently no contamination in the bedrock aquifer of the Metamora Landfill site, possibly because "the presence of the Lower Till may be preventing migration to this aquifer." JX 33 (Conceptual Site Model Report, supra, exec. summ. viii). Dr. Vanderpool testified that, in the future, it is possible that contaminants will migrate to the bedrock aquifer. Tr. at 1318:15-18. Dr. Vanderpool testified that this possibility has not been quantified and that no studies have predicted when and under what circumstances contamination of the bedrock aquifer might occur, Tr. at 1336:21-1337:10, but she did explain how the migration of the contamination might occur: "Just as we have discontinuity in the upper till, we've also documented discontinuity in the lower till. It occurs further north, but it's there. And we still have the possibility that if the fracturing phenomenon is occurring, that too can occur in the lower till." Tr. at 1318:20-25. Additionally, the Conceptual Site Model Report states that "contamination was found within [thirty] feet of the bedrock aquifer and a downward gradient is suspected between the intermediate and

bedrock aquifers." JX 33 (Conceptual Site Model Report, supra, exec. summ. iii). The bedrock aquifer is the source of the residential water supply. Tr. at 1319:3-5 (Testimony of Dr. Vanderpool).

There are fourteen domestic water wells downgradient of the Metamora landfill site. JX 33 (Conceptual Site Model Report, supra, at 64). Twelve of the wells draw water from the bedrock aquifer and two draw water from the shallow aquifer. *Id.* The wells in the shallow aquifer are 2350 feet and 2500 feet downgradient of the Metamora Landfill site. *Id.*

Dr. Vanderpool stated that drilling and excavating could disturb the till lenses and create a new pathway for materials deposited on a till lens to reach the shallow aquifer. Tr. at 1327:8-25. The industrial history at the site indicates that it is possible that contamination is sitting on the till lenses at the Landfill site. Tr. at 1324:1-3 (Testimony of Dr. Vanderpool). Dr. Vanderpool testified that barrels containing chlorinated hydrocarbons in liquid form were dumped at the Landfill site. Tr. at 1321:2-12. Chlorinated hydrocarbons are dense, non-aqeous phase liquids (DNAPL), meaning that they are insoluble, resist going into the aqueous phase and are heavier than water and sink downward under gravity. Tr. at 1321:15-1323:4. When tne contents of the drums containing the chlorinated hydrocarbons spilled, some of the liquid stayed in the soils and was excavated, but evidence was not found that indicated where all of the fluids went. Tr. at 1321:9-14. Dr. Vanderpool testified that there is no evidence that DNAPLs have impacted the groundwater or that DNAPLs have moved through the till lenses. Tr. at 1322:5-9, 1323:25-1324:1. While Dr. Vanderpool could not say "absolutely" that DNAPLs at

the site exist, she stated that it was "possible" that DNAPLs are "probably" sitting on the till lenses. Tr. at 1324:1-6.

In contrast to the hypothesized existence of DNAPLs at the site, uncontradicted evidence confirms that contaminants are dissolved in the groundwater and move with the groundwater. Tr. at 1320:21-1321:1 (Testimony of Dr. Vanderpool). The contaminants that are dissolved in the groundwater can also rest, or perch, on a till lens. Cf. JX 3, at D0185-86 (E.C. Jordan Co., Site Investigation Final Report 32-33 (Feb. 1986)), stating, in a section on regional hydrology, that "localized zones of perched groundwater exist where clay lenses are found at elevations above the water table"). Dr. Vanderpool testified that she is not aware of any studies regarding the Metamora Landfill site that quantify the possibility of contamination stopping at a till lens. Tr. at 1339:18-1340:3.

Further, Dr. Vanderpool testified that the possibility that till lenses are retaining contaminants "could be good news, as long as [the contaminants] stay there and nobody bothers them[,] . . . [but] it could be bad news if, for some reason, the [contaminants] came off of them." Tr. at 1322:18-23. She stated that if a thick enough layer of contamination rests on a till lens, the contamination can come off the lens by penetrating through the till or by flowing off the lens. Tr. at 1323:1-5. In the case of DNAPLs, the flow of the contamination follows the geometry of the till layer, which can create a situation where the contamination flows in a direction different than that of the groundwater. Tr. at 1323:5-24. Dr. Vanderpool also testified that excavating could disturb the till lenses and create a new release, or

pathway, for materials deposited on a till lens to reach the shallow aquifer. Tr. at 1327:8-1328:1.

While it is possible that plaintiff's mining of the AIC after May 1998 could cause additional contaminants to reach the shallow and intermediate aquifers, the court does not find that significant harm from groundwater contamination is a "practically certain or strongly probable result or a natural or inevitable consequence" of plaintiff's mining in the AIC. *Falkner*, 117 N.W.2d at 128. The two residential wells in the shallow aquifer at 2350 and 2500 feet downgradient of the Metamora Landfill site are not contaminated. JX 33 (Conceptual Site Model Report, supra, at 64). Plaintiff's mining Lease has been in effect since 1969, see supra Part I (discussing the history of this case), during which time groundwater contamination has spread to 500 and 1000 feet from the AIC, JX 33 (Conceptual Site Model Report, supra, at 40, 52); it therefore appears "contingent" or "doubtful" that contamination will spread to residential wells 2350 and 2500 feet away were plaintiff to mine in the AIC. *Thompson-McCully Co.*, 608 N.W.2d at 537 ("Equity will not interfere where injury from an anticipated nuisance is doubtful or contingent."). While "the more serious the impending harm, the less justification there is for taking the chances that are involved in pronouncing the harm too remote," Restatement (Second) of Torts § 933 cmt. b, and while expansion of the contaminant plume and the possibility that it will reach residential wells is a very serious harm, the likelihood that it will occur appears to the court to be remote.

Defendant also argues that mining in the AIC would violate Part 31 of NREPA. Def.'s Br. at 70. Part 31 provides in part:

> (1) A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following:
>
> (a) To the public health, safety, or welfare.

Mich. Comp. Laws Ann. § 324.3109(1)(a). Defendant argues that "because mining in the AIC would likely . . . result in the discharge of injurious substances into the groundwater, it is unlawful under . . . Part . . . 31." Def.'s Br. at 72. Defendant adds that, under section 324.3109(4), "it would be a *prima facie* public nuisance." Def.'s Br. at 77. Plaintiff did not respond to this argument in its post-trial briefing. The absence of argument from plaintiff appears to be based on plaintiff's contention that "defendant has abandoned its argument that Part 31 of NREPA . . . is a background principle of nuisance law. Defendant introduced no exhibits and provided no testimony that plaintiff's mining sand and gravel within the AIC would discharge any pollutants." Pl.'s Br. at 20 n.11.

The court agrees with the main point in plaintiff's argument that mining will not likely cause new discharges of pollutants. The court concludes, however, that the testimony concerning water pollution and the hydrogeology of the Metamora Landfill site strongly supports the court's conclusion above in Part II.B.2.a that mining would adversely impact the existing remediation of groundwater contamination. Precisely because the location of till lenses is uncertain, Tr. at 1337:18-1339:17 (Testimony of Dr. Vanderpool that the she is not aware of any study documenting the exact location of till lenses), and because the disturbance of

till lenses could create new pathways for pollution to spread, Tr. at 1327:8-1328:1 (Testimony of Dr. Vanderpool), plaintiff, as operator of a facility, could not mine without violating its duty to exercise due care to "clean[]up, remove, contain[], isolate, destroy, or treat[] . . . a hazardous substance released or threatened to be released into the environment." Mich. Comp. Laws Ann. § 324.20101(1)(cc) (emphasis added); see also § 324.20107a(1)(b) (articulating a facility operator's duty to exercise due care). The same facts that make it uncertain that excavating in any particular location will cause the discharge of injurious substances also make it uncertain that excavating in any particular location will not cause such a discharge and adversely impact the remediation effort.

c. Whether Mining in the AIC Would Cause a Nuisance Risk From Methane

Defendant argues that "mining within the AIC would create a public health risk because of the significant levels of methane emissions from the Metamora Landfill." Def.'s Br. at 75. To find a common law public nuisance with respect to methane, the court must determine that plaintiff's mining in the AIC would result in a significant harm that is a "practically certain or strongly probable result or a natural or inevitable consequence," *Falkner*, 117 N.W.2d at 128, of plaintiff's mining. In a case where, as here, the threatened hazard is serious, even catastrophic, "the less justification there is for taking the chances that are involved in pronouncing the harm too remote." Restatement (Second) of Torts § 933 cmt. b. The court must also find that plaintiff's mining would unreasonably interfere with "a common right enjoyed by the general public" and would either "significantly interfere[] with the

public's health, safety, peace, comfort, or convenience," or would be "proscribed by law." *Cloverleaf Car Co.*, 540 N.W.2d at 300.

In addition to its non-statutory nuisance argument, defendant also argues that "mining in the AIC . . . increases the risks of explosive conditions in violation of the duty to mitigate fire and explosion hazards under [§ 324.20107a(1)(b) of NREPA]." Def.'s Resp. Br. at 12. Because plaintiff is an operator of a facility, see Part II.B.2.a supra, and because section 324.20107a is a public health and safety statute, Mich. Comp. Laws Ann. § 324.20102(c), "harm to the public is presumed to flow from the violation of *[section 324.20107a,]* a valid statute enacted to preserve public health, safety and welfare." *Peterson*, 164 N.W.2d at 53; see also *People v. McKendrick*, 468 N.W.2d 903, 909 (Mich. Ct. App. 1991) (quoting *Peterson*, 164 N.W.2d at 53, and noting that such a violation "is characterized as a public nuisance"). The court now reviews the evidence regarding methane risks from the Metamora Landfill.

"When garbage degrades, it generates methane." Tr. at 232:1-2 (Testimony of Dr. Campbell); see also Tr. at 905:18-19 (Testimony of Mr. Henry, stating that "methane gas is formed in anaerobic conditions within [a] landfill"). Methane gas can travel laterally and follows the path of least resistance through the soil, so one does not generally know where methane gas is going to come up or where it might collect. Tr. at 1174:23-1175:2 (Testimony of Mr. Sygo); see also Tr. at 232:2-3 (Testimony of Dr. Campbell, stating that methane "migrates laterally"). Mr. Henry testified that there are two hazards posed by methane gas: explosion and asphyxiation. Tr. at 907:3-5; see also Tr. at 232:2 (Testimony of Dr. Campbell, stating that "methane gas

is an explosive gas"). Methane gas is "extremely flammable," Tr. at 907:7-9 (Testimony of Mr. Henry), so much so that "if you get a significant collection of methane . . . a spark could cause an ignition and an explosion," Tr. at 1174:13-15 (Testimony of Mr. Sygo).

A flammable gas has a range within which it will combust: "Below the lower explosive limit, the concentration of the flammable gas is not high enough to support combustion, and above the upper explosive limit, the concentration is so high . . . that it will not support combustion." Tr. at 911:2-8 (Testimony of Mr. Henry). The lower explosive limit for methane is five percent. Tr. at 315:18-20 (Testimony of Mr. Williams); 233:25-234:11 (Testimony of Dr. Campbell). Testimony did not indicate what the upper explosive limit of methane is, but testimony did indicate that fifty percent is "far above the upper explosive limit." Tr. at 911:13-14 (Testimony of Mr. Henry). Methane at concentration levels of concern "tends to collect in areas where you have structures, houses, any type of buildings, and in those situations, if you get a significant collection of methane . . . a spark could cause an ignition and an explosion." Tr. at 1174:9-15 (Testimony of Mr. Sygo); see also Tr. at 1174:15-22 (Testimony of Mr. Sygo describing the explosion of a private residence "as a result of methane migration into a residential area from an [adjacent] landfill"). With respect to asphyxiation, Mr. Henry testified that "if there's an underground structure, [methane gas] can actually displace the ambient air from there . . . [and] it could be an asphyxiation hazard . . . ." Tr. at 907:13-18.

The "major component" of the Metamora Landfill cap system remedy is "gas vents that vent any pressure from the methane buildup in the landfill." Tr. at 682:11-

19 (Testimony of Mr. Reid); see also Stip. Facts ¶ 16 (stating that the Landfill cap system remedy consists of, among other components, "installation, monitoring, and maintenance of a landfill gas venting system"). One of the reasons people are excluded from the AIC by a fence is because of the methane vents in the Landfill. Tr. at 315:6-13 (Testimony of Mr. Williams). Mr. Williams testified that if someone were to light a match or smoke a cigarette in the AIC, an explosion could occur if methane exceeded the lower explosive limit. Tr. at 315:13-17. Mr. Henry testified that, as far as he knows, the investigation regarding methane at the Metamora Landfill site has not been completed. Tr. at 907:24908 :1. Mr. Henry also testified that

> it was recognized visually that methane had been migrating from the landfill. On the eastern and northern perimeters of the landfill, there are mature trees that have died, undoubtedly as a result of methane migration displacing the oxygen from the soil that the trees' roots need in order to respire.

Tr. at 908:1-7; see also Tr. at 1177:2-8 (Testimony of Mr. Sygo, stating that methane gas "can cause . . . trees to die . . . and one of the indications of methane in some cases is looking at the vegetative growth in the immediate vicinity of the landfill to see if there's browning, and if there's . . . stress vegetation in those areas").

Michigan performed a soil gas survey on the Hughes property, which borders the northeastern corner of the Metamora Landfill site. Tr. at 908:21-24 (Testimony of

Mr. Henry). Michigan performed two borings-one twenty feet from the Landfill and the other two-hundred feet east of the Landfill site, and both between forty-five and fifty feet deep. Tr. at 909:1-6, 909:23-910:1 (Testimony of Mr. Henry). In the boring twenty feet from the Landfill, the state found the methane concentration to be "approximately fifty percent" by volume. Tr. at 910:6-10 (Testimony of Mr. Henry). In the boring two hundred feet from the Landfill site, the state found "normal soil gas compositions with no detectable concentrations of methane." Tr. at 910:14-17 (Testimony of Mr. Henry). There are also soil gas probes on the "southeast corner of the landfill, just to the northeast of the current retention pond, and . . . on the southwest corner of the landfill area, near the original access road to the landfill." Tr. at 923:22-924:2 (Testimony of Mr. Henry). Mr. Henry testified that he believes these probes show methane concentrations above the lower explosive limit, "about [ten] to [fifteen] percent by volume." Tr. at 924:5-8. These concentrations are above the lower explosive limit (five percent) for methane, see Tr. at 315:18-20 (Testimony of Mr. Williams), and appear to be within the upper explosive limit. Tr. at 911:13-14 (Testimony of Mr. Henry). Mr. Henry stated that it is "possible" that the methane gas migrating off the site is caused by the construction of the Landfill cap, but admitted that he did not know if the Landfill cap was the cause of the migration. Tr. at 924:10-16.

Mr. Sygo testified regarding the prohibition against excavating in an area where institutional controls are in place, noting that the presence of "institutional controls . . . might restrict the ability to excavate or to disturb any of the materials within an area that you have a

remedy that's in place . . . ." Tr. at 1177:21-1178:2. Mr. Sygo emphasized that "with a landfill situation, where you have a containment system that includes a cap, you certainly don't want somebody excavating in a manner that's going to allow you . . . to impact . . . the methane collection system, because that could . . . potentially exacerbate the situation and certainly impact on the long-term effectiveness of the remedy." Tr. at 1178:8-16. Mr. Sygo also testified that a spark could cause an explosion in the presence of a significant collection of methane, Tr. at 1174:9-15, and Mr. Henry testified that "in a[] confined space when [methane is] mixed with air, an ignition source can cause the situation to explode," Tr. at 907:18-19.

With respect to the common law nuisance risk of fire and explosion from methane gas, defendant must show that plaintiff's proposed use of the AIC-that is, mining sand and gravel-would result in a public nuisance that is a "practically certain or strongly probable result or a natural or inevitable consequence." *Falkner*, 117 N.W.2d at 128. One of the purposes of the AIC is to prevent the possibility that an ignition source would get too close to a methane vent. Tr. at 315:6-17 (Testimony of Mr. Williams). If plaintiff were to mine sand and gravel in the AIC, plaintiff would have to go inside the fenced AIC perimeter designed, among other purposes, to prevent methane explosions caused by people being too close to methane vents. An explosion on the Metamora Landfill site would be a very serious harm affecting adjacent landowners. As the Restatement notes, "the more serious the impending harm, the less justification there is for taking the chances that are involved in pronouncing the harm too remote." Restatement (Second) of Torts § 933 cmt. b.

The seriousness of the harm must be weighed against the likelihood that it will occur, and absolute certainty is not required where the harm is sufficiently serious. The court finds that a methane explosion at the Metamora Landfill site is a very "significant harm," *Thompson-McCully Co.*, 608 N.W.2d at 537, and given the seriousness, the harm is not so "doubtful or contingent," *Foster*, 46 N.W.2d at 429, as to be a risk that would be allowable under Michigan nuisance law.

The right to be free from explosion and fire hazards is one of the "common rights enjoyed by the general public." *Cloverleaf Car Co.*, 540 N.W.2d at 300; see also *Buckeye Union Fire Ins. Co.*, 178 N.W.2d at 480 (stating that "the very nature of the nuisance . . . [of] a fire hazard" is that "sheer chance or an act of God (lightning) would convert the peril to the neighboring land into a destructive force."). The Restatement (Second) of Torts states, with respect to public rights, that "a fire hazard to [even] one adjoining landowner may be a public nuisance because of the danger of a conflagration." Restatement (Second) of Torts § 821B cmt. g. Because the court finds it sufficiently likely that plaintiff's presence in the AIC would cause significant harm to adjoining landowners, the court finds that plaintiff's presence would also "unreasonably" and "significantly interfere[] with the public's health, safety, peace, comfort, or convenience." *Cloverleaf Car Co.*, 540 N.W.2d at 300.

The court also finds that plaintiff's presence in the AIC is "proscribed by law." *Cloverleaf Car Co.*, 540 N.W.2d at 300. The court found, above, that plaintiff is one who "operates . . . a facility." See supra Part II.B.2.a. The Metamora Landfill site contains a combination of waste that, if improperly treated, may

pose a substantial hazard to human health or the environment because of the danger of a methane explosion. Thus, the methane at the site is "hazardous waste" under section 324.11103(3) and a "hazardous substance" under section 324.20101(1)(t). Because methane gas is a hazardous substance, section 324.20107a(1)(b) requires plaintiff to exercise due care by taking actions necessary to protect the public health, safety, or welfare by mitigating fire and explosion hazards due to methane gas. The court finds that plaintiff's presence in the AIC, an area designed to mitigate the risk of explosion due to methane gas by barring unnecessary presence in the area, is prohibited *by section 324.20107a(1)(b)* and that plaintiff's presence in the AIC would violate that section.

The court has determined, see supra Part II.B.2.a, that section 324.20101a is a public health, safety and welfare statute and, as such, under *Peterson*, harm to the public is presumed to flow from its violation. See *Peterson*, 164 N.W.2d at 53 ("Harm to the public is presumed to flow from the violation of a valid statute enacted to preserve public health, safety and welfare."). Accordingly, plaintiff was required to present evidence that would rebut the presumption of public harm. Plaintiff has neither presented an argument nor pointed to evidence that would rebut the presumption that harm would flow from its violation of *section* 324.20107a(1)(b) with respect to methane. The court finds that if plaintiff were present in the AIC, plaintiff's presence would be "proscribed by law," *Cloverleaf Car Co.*, 540 N.W.2d at 300, and that plaintiff has not rebutted the presumption that "harm to the public [would] flow from the violation," *Peterson*, 164 N.W.2d

at 53. For the foregoing reasons, plaintiff's presence in the AIC would be a public nuisance.

d. Whether Michigan Could Have Abated Mining in the AIC Because of Public Nuisances

Having found that plaintiff's presence and mining in the AIC would create public nuisances, the court must determine whether the state could have abated those nuisances by prohibiting plaintiff from using the AIC. See *Lucas*, 505 U.S. at 1029 (stating that limitations on the use of property must "do no more than duplicate the result that could have been achieved . . . by adjacent landowners . . . under the state's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise").

Defendant relies on a number of NREPA provisions to argue that Michigan has the right to physically enter a property to abate a nuisance. See Defendant's Pretrial Memorandum of Contentions of Fact and Law at 49-51 (arguing that "physical ouster is allowed in order to abate certain nuisances" (emphasis omitted)). Plaintiff argues that "Michigan law requires that abatement of a nuisance be carefully tailored to avoid injury in legitimate business operations. Defendant has cited no Michigan case that holds that the government may permanently and physically occupy real property to abate a nuisance. Plaintiff's research discloses no such case." Pl.'s Br. at 30. Nor has the court found such a case or, indeed, any Michigan case closely analogous to this one.

The court has found that, if plaintiff were to mine in the AIC, plaintiff would cause common law nuisances by adversely impacting the remediation of methane

emissions and by creating a risk of a methane explosion. See supra Part II.B.2.c. These findings were based, in part, on the existing site conditions. "The remedy at the Metamora Landfill is designed to exist for a minimum of [thirty] years," Stip. Facts ¶ 22, and perhaps longer if, for example, in thirty years there remained hazardous material underneath the Landfill cap that would be venting methane, Tr. at 307:14-20 (Testimony of Mr. Williams). Plaintiff's Lease expires in 2019. See JX 1 (Lease ¶ 2, providing for a fifty-year term "from and after the 1st day of August 1969"). When plaintiff's Lease expires, the remedy at the Metamora Landfill site will still be in place. Plantiff's mining or presence in the AIC at any time during plaintiff's Lease term will cause the same nuisances.

The court can conceive of no remedy that would abate the methane nuisance and prevent an adverse impact on the existing remediation that would not also completely prohibit plaintiff from mining in the AIC. Thus, the "'destruction'" of plaintiff's right to mine in the AIC is "'essential to the public safety[] [and] health." See *Osborn*, 72 N.W. at 985 ("'The police power is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction and abatement by summary proceedings of whatever may be regarded as a public nuisance.'" (quoting *Lawton v. Steele*, 152 U.S. 133, 136, 38 L. Ed. 385, 14 S. Ct. 499 (1894))).

The court finds that the power to do what is required to remediate modern environmental hazards inheres in Michigan's police power just as much as the power to abate long-familiar common law public nuisances such as fire or explosion. An example in the *Lucas* case itself indicates that the background

principles exception applies to the abatement of modern hazards. The Court stated that "the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault," would not be entitled to compensation. 505 U.S. at 1029. This example demonstrates a situation where the government may discontinue a current use without providing compensation. The prevention of a use, as here, is closely analogous.

Because the power to abate a nuisance includes the power to prohibit a use of the property that would cause the nuisance, *Osborn*, 72 N.W. at 985, the court concludes that plaintiff could have been prevented under Michigan law from mining or being present in the AIC. The court finds that defendant, in preventing plaintiff from mining in the AIC, "[did] no more than duplicate the result that could have been achieved in the courts-by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise." *Lucas*, 505 U.S. at 1029.

III. Conclusion

Based on the evidence presented at trial and for the foregoing reasons, the court determines that defendant is not liable for a taking in this case, both because plaintiff lacks a compensable property interest, and because plaintiff's proposed mining would adversely impact the existing remediation of groundwater contamination and would constitute a failure to exercise due care to protect the public health, safety, and welfare. The court directs the Clerk of the Court to

enter judgment in favor of defendant as to all claims of John R. Sand & Gravel Co. No costs.

IT IS SO ORDERED.

EMILY C. HEWITT

Judge

Footnotes

n1 For additional background information, see *John R. Sand & Gravel Co. v. United States*, 60 Fed. Cl. 230, 232-33 (2004) (granting defendant's cross-motion for summary judgment that the nuisance exception can be available as a defense in a physical takings case and denying the balance of defendant's cross-motion and plaintiff's motion for summary judgment); *John R. Sand & Gravel Co. v. United States*, 59 Fed. Cl. 645, 647-48 (2004) (denying motion to intervene by group of entities who participated in the remediation of the Metamora Landfill site), *appeal docketed*, No. 04-5066 (Fed. Cir. Feb. 27, 2004); *John R. Sand & Gravel Co. v. United States*, 57 Fed. Cl. 182, 193 (2003) (denying "defendant's motion for summary judgment that plaintiff's complaint is time-barred . . ., except with respect to the monitoring wells not abandoned and still in operation").

n2 For convenient reference, the name and a description of each witness on whose testimony the court relies in this opinion follows:

> Dr. James R. Campbell is the president of Engineering Management and became the project manager for the Metamora Landfill site investigation and remediation in 1992. Tr. at 50:25-52:22 (Testimony of Dr. Campbell).

Lt. Gregory C. Eagle has been the supervisor of a unit of detectives specializing in investigating environmental offenses in the Office of Criminal Investigations at the Michigan Department of Environmental Quality (MDEQ) since 1987. Tr. at 703:16-704:13 (Testimony of Lt. Eagle). Lt. Eagle first became involved in the Metamora Landfill site in 1980 when he was asked to do some field work at the site because of its placement on a list of sites of potential or known contamination. Tr. at 705:9-22 (Testimony of Lt. Eagle).

Edward W. Evatz, Jr., is the current President of John R. Sand & Gravel Co. Tr. at 355:10-23 (Testimony of Mr. Evatz). He became president in 1992. Tr. at 355:24-356:1 (Testimony of Mr. Evatz). In 1969, when plaintiff leases the Metamora site, Mr. Evatz's father ran the sand and gravel operation at the site. Tr. at 361:1-9 (Testimony of Mr. Evatz). Mr. Evatz began working at the site in 1970. Tr. at 468:3-6 (Testimony of Mr. Evatz).

Mark A. Henry has been employed by the MDEQ and its predecessor, the Michigan Department of Natural Resources since 1980. Tr. at 858:15-859:8 (Testimony of Mr. Henry). He currently works as a Project Manager and the only environmental engineer in the Superfund Section of the Remediation and Redevelopment Division of MDEQ. Tr. at 862:23-24, 863:8, 865:3-5 (Testimony of Mr. Henry). The Superfund Section works with the United States Environmental Protection Agency (EPA) on environmental sites in Michigan that are on the National Priorities List, a list of the most contaminated sites in the

country. Tr. at 863:8-18 (Testimony of Mr. Henry). Mr. Henry first began working at the Metamora Landfill site in 1998. Tr. at 863:23-864:4 (Testimony of Mr. Henry).

James A Reid has hel various positions at Conestoga-Rovers & Associates (CRA) and is currently an Associate, which is the first management level below the vice president. Tr. at 587:1, 588:2-14, 589:7-14 (Testimony of Mr. Reid). Mr. Reid served as Project Engineer at the Metamora Landfill site from 1992-1993. Tr. at 589:4-6, 590:2-7 (Testimony of Mr. Reid). He then became a Project Coordinator at the site and is now the Project Manager. Tr. at 590:8-13 (Testimony of Mr. Reid).

James A. Sygo is currently the Deputy Director for the Waste and Hazardous Materials, Air Quality and Remediation and Redevelopment Divisions at the MDEQ. Tr. at 1142:15-23 (Testimony of Mr. Sygo). He has been working at the MDEQ for twenty years. Tr. at 1143:5-9 (Testimony of Mr. Sygo). Mr. Sygo became familiar with the Metamora Landfill site when he worked in the MDEQ Saginaw District Office. Tr. at 1155:18-23 (Testimony of Mr. Sygo). He visited the site on one occasion in 1984, and his division was involved in evaluation the characterization of the wastes that were being removed from the site. Tr. at 1155:23-1156:9 (Testimony of Mr. Sygo). Mr. Sygo was also involved in the evaluation of the possible placement of a permeable cap on the site. Tr. at 1156:4-6 (Testimony of Mr. Sygo).

Glenn Turchan is currently Executive Vice President at CRA, but he also functions as an engineer. Tr. at 1004:15, 1005:3-1006:2 (Testimony of Mr. Turchan). He specializes in environmental engineering and hydrogeology. Tr. at 1006:8-9 (Testimony of Mr. Turchan). Mr. Turchan first became involved with work at the Metamora Landfill site in 1990. Tr. at 1008:20-1009:1.

Thomas T. Williams is the current EPA Remedial Project Manager for the Metamora Landfill site. Tr. at 292:12-23, 293:19-23 (Testimony of Mr. Williams). He became the Remedial Project Manager of the site in 1998. Tr. at 294:10-12 (Testimony of Mr. Williams). The primary duty of a Remedial Project Manager is to supervise the cleanup of hazardous waste sites. Tr. at 292:24-293:6 (Testimony of Mr. Williams).

Dr. N. Luanne Vanderpool has been a geologist at the EPA since 1988. Tr. at 764:8. 765:3-5, 769:13-14 (Testimony of Dr. Vanderpool). She provides technical support to the Superfund program and specializes in hydrogeology, the study of processes related to groundwater. Tr. at 765:5-18 (Testimony of Dr. Vanderpool). Dr. Vanderpool became involved with the Metamora Landfill site at the request of Mr. Williams in 1999 when changing the groundwater remedy at the site was under construction. Tr. at 766:20-767:2, 770:11-771:8 (Testimony of Dr. Vanderpool).

n3 "The concept with the operable units was that if you had different media or different types of issues, you could split the project into different operable units." Tr. at 1017:9-12 (Testimony of Mr. Turchan).

n4 "Institutional controls" is a term used by the EPA to describe "controls [that] are placed on the property for specific reasons, typically to protect individuals from future exposures, along with ensuring that the property remains in a protective condition." Tr. at 314:5-12 (Testimony of Mr. Williams). The Metamora Landfill AIC was developed in 1998, before the Landfill cap design was completed. Tr. at 154:2-4 (Testimony of Dr. Campbell). The fence was designed to enclose the area needed to complete the construction of the Landfill cap and to be the area of institutional controls. Tr. at 154:4-11 (Testimony of Dr. Campbell).

n5 In a prior opinion in this case, the court decided that the Lucas "background principles" exception to takings liability applies to physical takings as well as to regulatory takings. See *John R. Sand II*, 60 Fed. Cl. at 235 ("The court finds that the better-reasoned position is that the background principles exception to takings liability discussed in *Lucas* can apply to both regulatory and physical takings cases."). "Because *Lucas* was a regulatory takings case, plaintiff and defendant disputed whether the 'background principles' exception to takings liability applied to physical takings as well as to regulatory takings." *Id.* (citation omitted); see also *Lucas*, 505 U.S. at 1009 (stating that plaintiff alleged a taking based on the state's passage of the Beachfront Management Act).

n6 In the court's prior summary judgment opinions, the court left open the question of when plaintiff's taking claim first accrued. See *John R. Sand II*, 60 Fed. Cl. at 241 (treating plaintiff's taking claim as having accrued on January 8, 1997 only "for the purpose of considering the pending motions"); *John R. Sand I*, 57 Fed. Cl. at 193 (finding plaintiff's claim not to be timebarred and

stating that "the court need not now decide exactly when plaintiff's claim first accrued").

n7 Plaintiff's denial of access to defendant's representatives on two occasions in 1996 led the EPA to issue an administrative access order in December of 1996, which prohibited plaintiff from interfering with the AIC. JX 45 (Administrative Order Directing Compliance with Request for Access in In re Metamora Landfill Site, No. 97-C-379 PP 4(n), 6(g) (EPA Dec. 18, 1996)). Despite this order, plaintiff continued to interfere with site access. See, e.g., DX 169 (Letter from Longo to Haynes of 1/29/97, at 1, stating that "due to your client's [John R. Sand's] refusal to allow access, the [Metamora Landfill Settling Potentially Responsible Party Group (MLSPG)] was forced to suspend activities at the site"). In 1997, defendant filed a complaint in the District Court for the Eastern District of Michigan, seeking an order in aid of access to the Metamora Landfill site. See JX 24 (United States v. John R. Sand & Gravel Co., No. 97-75497, at 1 (E.D. Mich. Mar. 23, 1998)). On March 23, 1998, the court granted the government and its representatives access to the Metamora Landfill site and authorized relocation of the AIC perimeter fencing. See JX 24 (United States v. John R. Sand & Gravel Co., No. 97-75497, at 2-3 (E.D. Mich. Mar. 23, 1998)). Relocation of the perimeter fence was completed in May of 1998. See JX 25 (Letter from Campbell to Haynes of 5/12/98, stating that "relocation of sections of the Site security fence has been completed").

n8 The Estate of Russell Parrish now owns the property. Stip. Facts ¶ 2.

n9 The court examines certain aspects of defendant's nuisance-related argument in the section addressing background principles of Michigan law. See infra Part II.B.

n10 The Michigan Department of Natural Resources is now called the Michigan Department of Environmental Quality. Tr. at 858:23-859:8 (Testimony of Mr. Henry).

n11 The Texaco case, on which defendant also relies, is a regulatory takings case in which the Supreme Court examined a takings challenge to an Indiana statute that provided that "a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property, unless the mineral owner files a statement of claim in the local county recorder's office." 454 U.S. at 518. In holding that the statute did not take private property without just compensation, the Court stated,

> In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, this Court has never required [the government] to compensate the owner for the consequences of his own neglect. We have concluded that the [government] may treat a mineral interest that has not been used for 20 years and for which no statement of claim has been filed as abandoned; it follows that, after abandonment, the former owner retains no interest for which he may claim compensation. It is the owner's failure to make any use of

> the property-and not the action of the [government]-that causes the lapse of the property right; there is no "taking" that requires compensation. The requirement that an owner of a property interest that has not been used for 20 years must come forward and file a current statement of claim is not itself a "taking."

Id. at 530. Defendant focuses on the portion of the passage that states, "This Court has never required [the government] to compensate the owner for the consequences of his own neglect." Def.'s Br. at 40. The Supreme Court found that a property owner's "neglect" in failing to follow a constitutional regulatory scheme, which required an owner to use property or file a claim, caused the owner to lose its property interest. In the present case, there is no scheme or government action that divests plaintiff of its property interest. The court views *Texaco* as distinguishable from the present case and inapplicable to the facts before it.

n12 "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Adkins v. Thomas Solvent Co., 440* Mich. 293, 487 N.W.2d 715, 719 (Mich. 1992) (citing Restatement (Second) of Torts § 821D (1979)). The Michigan Supreme Court has stated that

> an actor is subject to liability for private nuisance . . . if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion

> results in significant harm[,] (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct.

Id. at 720 (citing Restatement (Second) of Torts § § 821D-F (1979)). This opinion focuses on the public nuisances alleged.

n13 The parties dispute whether the nuisance defendant alleges is an anticipatory nuisance, Pl.'s Br. at 17, or an ongoing nuisance, Def.'s Resp. Br. at 20. The only permitted use of the leased property is sand and gravel mining and related activities. JX 1 (Lease ¶ 1). As of May 1998, plaintiff was not mining in the area alleged to have been taken. Defendant's argument under Lucas must therefore be that plaintiff's proposed use would be a nuisance. The court thus applies an anticipatory nuisance standard.

n14 In the published form of this case, the dissenting opinion precedes the majority opinion. See *Peterson*, 164 N.W.2d at 44 (noting in the syllabus that Chief Justice Brennan authored the opinion, with a dissent by Justices Adams and Kavanagh, and beginning the opinion with Justice Adams' dissent). A subsequently published electronic version of the opinion, at 381 Mich. 445, 164 N.W.2d 43, 1969 Mich. LEXIS 139, corrects the opinion's format. The court draws attention to this anomaly to prevent confusion and to note that its opinion relies solely on the *Peterson* majority.

n15 The court uses the version and numbering of the law in effect in May of 1998, the date of the alleged taking, see supra Part II.A.1 (deciding that plaintiff's takings claim accrued in May 1998).

n16 "Residential drinking water protection criteria" is the "concentration [of contaminants] in soil which is protective of groundwater." Tr. at 626:15-19 (Testimony of Mr. Reid).

n17 The state's power to abate nuisances is limited in certain circumstances. If a nuisance arises out of the operation of a legitimate business, the nuisance should be abated, if possible, in a way that does not completely destroy the business. See, e.g., *Rohan v. Detroit Racing Ass'n*, 314 Mich. 326, 22 N.W.2d 433, 446 (Mich. 1946) ("'If a nuisance is private and arises out of a particular manner of operating a legitimate business, the court will do no more than point to the nuisance and decree adoption of methods calculated to eliminate injurious features.'"). The court observes that these limitations of police power are irrelevant to the case before it. The nuisances considered are not private; there is no allegation that an entire business is destroyed; and the nuisances would arise out of the ordinary operation of the business.

n18 The Landfill cap was completed in 2001, but the fence was not moved until 2003. Tr. at 156:3-158:6 (Testimony of Dr. Campbell). Testimony indicated that the initiation of this lawsuit led to the relocation of the fence to encompass a smaller area. Tr. at 154:11-18 (Testimony of Dr. Campbell). Testimony further indicated that, although this suit was filed in 2002, the group responsible for the cleanup activities did not

begin discussing the suit until 2003. Tr. at 157:23158 :6 (Testimony of Dr. Campbell).

n19 Contaminants of concern, or constituents of concern (COCs), are the contaminants that have been identified in the groundwater at the Metamora Landfill to be of the most concern. Tr. at 620:15-25 (Testimony of Mr. Reid). The following COCs have been found at the Metamora Landfill site: acetone; arsenic; benzene; 1,2-dichloroethane; cis-1,2-dichloroethene; ethylbenzene; 4-methyl-2-petanone; toluene; 1,1,2-trichloroethane; trichloroethene; and vinyl chloride. JX 33 (Conceptual Site Model Report, supra, tbl. 4.1). Both the EPA and the Michigan Department of Environmental Quality approved this list. Tr. at 621:13-14 (Testimony of Mr. Reid).

n20 Exhibits DX 461b, DX 461c and DX 461f map groundwater monitoring wells and highlight those where COCs exceeding Michigan drinking water criteria exist. The court bases its conclusion that the shallow aquifer beneath the AIC, as a whole, is contaminated on the comparison of the monitoring wells located to the south of the Landfill and to the north of the Landfill. Exhibits DX 461b, DX 461c and DX 461f all show that exceedances exist both to the south and to the north and northwest of the Landfill area. See, e.g., DX 461b (Map, 2000 Extent of Impacted Groundwater, Shallow Aquifer, Metamora Landfill Site, demonstrating that MW3698, MW37-98 and MW17S-98, all to the south of the Landfill, and MW-8, MW-16, MW31A-94 and MW24D-98, all to the north of the Landfill, had COCs exceeding Michigan drinking water criteria). Because "groundwater flow [in the shallow aquifer] is predominantly to the north and northwest,"

JX 33 (Conceptual Site Model Report, supra, at 62), the groundwater in the shallow aquifer between the contaminated southern wells and the contaminated northern wells is contaminated.

n21 The fact that the court finds this area not to be a facility does not affect the outcome of this case. The court ruled, above, that defendant is not liable for a taking in this case because plaintiff contributed to the problem defendant sought to resolve by acquiring its leasehold interest subject to the Landfill operation and by cooperating with the Landfill operation. See supra Part II.A.4 (discussing defendant's defense that plaintiff acquired its leasehold subject to the Landfill operation).

n22 The Conceptual Site Model Report provides a more technical description of biodegradation:

> Microbial biodegradation involves the utilization of carbon from an organic compound (the substrate) for microbial cell growth. As part of the biodegradation process, electrons are transferred from the organic substrate (electron donor) to an available electron acceptor. The transfer of electrons is defined as an oxidationreduction (redox) reaction. Energy derived from this transfer of electrons is utilized by soil microorganisms for cellular respiration.

JX 33 (Conceptual Site Model Report, supra, at 67-8).

n23 "Excavations and filling and drilling and mining would" pose a "risk to the remedy" implemented by the AIC by, for example, destabilizing the flow system or disturbing till lenses and creating new releases. Tr. at 1326:22-1327:16 (Testimony of Dr. Vanderpool).

n24 The "vadose zone is . . . an unsaturated zone that's the zone between the surface of the ground and the aquifer that is not saturated with water." Tr. at 628:11-14 (Testimony of Mr. Reid).

n25 Geomorphic evidence and the 1994 pre-design hydrologic investigation report support the conclusion that till lenses exist at the Metamora Landfill site. Tr. at 1324:8-1325:10 (Testimony of Dr. Vanderpool). The presence of surface water bodies in an area with deep groundwater, as exists in the Metamora Landfill area, indicates that till lenses exist because "to have a surface water body remain[] means you have to have something that holds the ground water, otherwise the surface water would just recharge down to the main ground water body." Tr. at 1324:9-20 (Testimony of Dr. Vanderpool). The pre-design hydrologic investigation drilled into the ground looking for saturated zones that form on the top of till lenses, called "perched water," and found them under and to the south of the Landfill. Tr. at 1324:22-1325:15 (Testimony of Dr. Vanderpool).

No. 02-509 L

UNITED STATES COURT OF FEDERAL CLAIMS

JOHN R. SAND AND GRAVEL CO.,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

June 27, 2003, Filed

COUNSEL: Jeffrey K. Haynes, Bloomfield Hills, MI, for plaintiff. L. Rider Brice, III, Bloomfield Hills, MI, of counsel.

John S. Most, with whom was Thomas L. Sansonetti, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, Washington, DC, for defendant. Peter Felitti, Washington, DC, of counsel.

OPINION AND ORDER

This case is before the court on defendant's motion for judgment on the pleadings or, in the alternative, for summary judgment. Plaintiff (John R. Sand or plaintiff) seeks compensation for defendant's physical taking of plaintiff's property during the environmental remediation of an adjacent landfill site. See Complaint (Compl.) at 1, 913.[1]

I. Background[2]

In 1969, plaintiff entered into a 50-year lease for a 158-acre tract of land in Metamora Township, Lapeer County, Michigan, for the purpose of mining and marketing sand, stone, and gravel. See Compl. at 2; Def.'s Mot. at 3. The Metamora Landfill Site (Landfill), is a contaminated landfill located in the northern portion of the plaintiff's leasehold property (Property). See Compl. at 3; Def.'s Mot. at 3. [3]

The Michigan Department of Natural Resources (DNR) began investigations at the Landfill in 1981 following the discovery of drums containing hazardous waste. Def.'s Mot. at 3. In 1984, the Environmental Protection Agency (EPA) placed the Landfill on its "National Priority List" of hazardous waste sites, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § § 9601-9675 (1995). Def.'s PFUF ¶ 2.

In February 1986, EPA completed a Site Characterization Report for the Landfill and by August 1986, a Phased Feasibility Study was completed. See Compl. at 4. A Record of Decision (ROD) was signed by the Regional Administrator of EPA on September 1, 1986 (First ROD). *Id.* The First ROD contains remedial action plans for the south central portion of the Landfill (area 1) and the northwest portion of the Landfill (area 4). *Id.* By March 1989, EPA had completed a Remedial Investigation of the Landfill, which included the taking of soil samples and the installation of monitoring wells. *Id.* Some of this soil sampling and well installation occurred in areas of the Property that are not within the Landfill. *Id.*

A second ROD for final remedial action was issued in September 1990 (Second ROD). *Id.* The Second ROD

called for a cap over the northern portion of the Landfill (Landfill Cap), a pump and treat system for contaminated liquids, and deed restrictions over the Landfill. Pl.'s Opp. at 3. It did not, however, provide a metes and bounds description of the Landfill Cap, indicate when construction of the Landfill Cap would begin, or exclude plaintiff from any portion of its leasehold. Pl.'s Suppl. Br. at 3-4. EPA continued remedial activities during the following two years, including the construction of a concrete storage pad[4] to the east of the supply pond and the installation of additional monitoring wells on various portions of the Property. Def.'s Suppl. Br. at 2; see Pl.'s Suppl. Br. Exhibit (Ex.) 20.

In or about 1992, EPA and its agents mobilized to remove barrels and contaminated material from the Landfill. Compl. at 4. EPA demanded and acquired access to the Property in order to perform these removal operations. *Id.* EPA erected fences in plaintiff's plant area (Plant Area) during the winter of 1992-1993. *Id*; see Compl. Ex. 7 (map indicating fencing activities on the Property).[5] The impact of these fences on plaintiff's access to the Property and the legal consequences of that impact are at the center of this dispute. It is clear that the fences temporarily prevented plaintiff from operating its machinery and selling finished products to customers. Compl. at 4-5; Pl.'s Opp. at 5. Defendant argues that this exclusion was sufficiently permanent to effect the accrual of a taking, thereby time-barring plaintiff's present takings claim. Def.'s Mot. at 4-5; Def.'s Suppl. Br. at 7. However, following protests from plaintiff, EPA opened its gate to plaintiff and relocated the fences to areas outside plaintiff's Plant Area. Def.'s Mot. at 5;

Pl.'s Opp. Ex.17 P 6 (Declaration of Edward W. Evatz, Jr.) (Evatz Decl.). Plaintiff subsequently continued its mining and gravel operations on portions of the Property. Evatz Decl. ¶ 4.[6]

While plaintiff continued to use the Property, plaintiff's counsel wrote a series of letters to defendant from 1992-1994 asserting plaintiff's property rights and entitlement to "just compensation." See Def.'s Ex. 4-8. These letters had little effect on defendant's remedial actions on the Property. In February 1994, EPA installed an additional fence in plaintiff's Plant Area south of plaintiff's supply pond. Pl.'s Opp. at 5. This fence temporarily deprived plaintiff of access to its pond and stockpile areas. *Id.* EPA removed this fence in the summer of 1994, at which time plaintiff restarted its water supply well and used it continuously thereafter. Evatz Decl. ¶ 8.

On August 28, 1996, EPA amended the Second ROD (1996 Amendment). Compl. at 5. The 1996 Amendment provides that contaminated soil excavated from a portion of the Landfill be consolidated with other waste material from the Landfill and redeposited on the Landfill under the Landfill Cap. *Id.* The 1996 Amendment did not define the area to be covered by the Landfill Cap nor did it describe any related area to which access would be barred. Pl.'s Suppl. Br. at 5.

On December 18, 1996, EPA issued an Administrative Order (Administrative Order), No. 97-C-379, to plaintiff. Compl. at 6. The Administrative Order became effective on January 8, 1997, 21 days after its issuance. *Id.* It requires plaintiff to grant EPA and its agents, subcontractors, consultants, and representatives entry and access to all portions of the

Property for all activities that EPA asserts are necessary to complete actions required under the Consent Decree.[7] *Id.* (citing Compl. Ex. 2, Administrative Order ¶ 6.a). The Administrative Order forbids plaintiff from interfering with or impeding the selected remedy, including access roads, components of the groundwater treatment system, and fencing. *Id.* at 7 (citing Compl. Ex. 2, Administrative Order ¶ 6.d). It also defines by metes and bounds the area containing the Landfill Cap (the Area of Institutional Controls)[8] and prohibits plaintiff from interfering with the Area of Institutional Controls by excavating, grading, filling, drilling, drilling, mining, storage, disposal, or other construction or development. *Id.* (citing Ex. 2, Administrative Order ¶ 6.g); Pl.'s Suppl. Br. at 6. Plaintiff, under threat of a $ 25,000 a day penalty for noncompliance, agreed to comply with the Administrative Order and ceased all mining activity in the Area of Institutional Controls. Compl. at 7. At the time that EPA issued the Administrative Order, plaintiff was mining within the Area of Institutional Controls. *Id.*; Evatz Decl. ¶ 10.

Pursuant to the Administrative Order, EPA immediately began more extensive work at the Landfill and on the Property, including running hundreds of gravel trucks carrying fill for the Landfill Cap through plaintiff's Plant Area. Compl. at 7. On June 11, 1997, plaintiff's president and its counsel walked the Landfill and took pictures showing portions of the Area of Institutional Controls. Pl.'s Opp. at 7. Disputes arose among the parties relating to the plaintiff's compliance with the Administrative Order. Compl. at 8. On March 23, 1998, the United States District Court for the Eastern District of Michigan entered an order enjoining

plaintiff from interfering with entry by EPA, its contractors and representatives onto the Landfill or the Property. *Id.* A fence, begun on April 27 and completed on May 12, 1998, was installed around the Area of Institutional Controls, enclosing approximately 42 acres of plaintiff's 158-acre leasehold. See Pl.'s Opp. at 7; Pl.'s PFUF ¶ 31. This fence completely excluded plaintiff from the Area of Institutional Controls. Pl.'s PFUF ¶ 31 (citing Evatz Decl. ¶ 11).

Between 1998 and 2000, EPA placed 200,000 yards of fill dirt on the Area of Institutional Controls and constructed the landfill cap, together with a drainage system and perimeter road. PFUF P 32. EPA has abandoned several of the previously installed monitoring wells on the leased Property and in the Area of Institutional Controls. See Compl. at 9; Pl.'s Suppl. Br. at 7. Plaintiff's complaint was filed May 20, 2002.

II. Discussion

A. Standard of Review

A motion for judgment on the pleadings is treated as a motion for summary judgment under Rule 56 if "matters outside the pleadings are presented to and not excluded by the court." Rules of the United States Court of Federal Claims (RCFC) 12(c). Both parties included materials outside of the pleadings in their briefing. Therefore the court addresses defendant's alternative motion for summary judgment.

Summary judgment is warranted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48,

91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A fact that might significantly affect the outcome of the litigation is material. *Anderson*, 477 U.S. at 248. Disputes over facts that are not outcome determinative will not preclude the entry of summary judgment. *Id.* at 247-48.

The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If the moving party demonstrates an absence of a genuine issue of material fact, the burden then shifts to the non-moving party to show that a genuine issue exists. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987). The movant is also entitled to summary judgment if the non-movant fails to make a showing sufficient to establish an element of its case on which it will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23. The court must resolve any doubts about factual issues in favor of the party opposing summary judgment, *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985), to whom the benefits of all favorable inferences and presumptions run. *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1574 (Fed. Cir. 1984), cert. denied, 474 U.S. 818, 88 L. Ed. 2d 52, 106 S. Ct. 64 (1985).

B. Statute of Limitations

Defendant argues that plaintiff's complaint should be dismissed as time-barred under the applicable statute of limitations because plaintiff's claim accrued, at the latest, in 1992, nearly ten years before the filing of plaintiff's complaint. See Def.'s Mot. at 1. Plaintiff maintains that defendant has incorrectly calculated the

date of accrual for plaintiff's claims and that plaintiff's complaint was filed well within the statute of limitation period. See Pl.'s Opp. at 9.

The applicable statute of limitations for filing suit in the Court of Federal Claims is six years. 28 U.S.C. § 2501 (1994). The statute provides that "every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." *Id.* The six-year limitations period for actions against the United States "is a jurisdictional requirement attached by Congress" that must be strictly construed. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988); see also *Franconia Assocs. v. United States*, 240 F.3d 1358, 1362 (Fed. Cir. 2001)[9] (quoting *Hart v. United States*, 910 F.2d 815, 817 (Fed. Cir. 1990)) ("The six-year statute of limitations acts as 'an express limitation on the Tucker Act's waiver of sovereign immunity.'"); *Seldovia Native Ass'n v. United States*, 144 F.3d 769, 774 (Fed. Cir. 1998) (stating that "statute of limitations issues . . . are jurisdictional").

To defeat defendant's motion to dismiss this case, plaintiffs must establish "jurisdictional timeliness." *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189, 80 L. Ed. 1135, 56 S. Ct. 780 (1936)). Plaintiff cannot rely merely on the allegations in the complaint if jurisdiction is challenged. *Reynolds v. Army & Air Force Exch. Ser v.*, 846 F.2d 746, 747 (Fed. Cir. 1988). Because plaintiff bears the burden of proof by a preponderance of the evidence, it must offer relevant, competent evidence to show that it filed suit within six years of the accrual of

its claims. See 28 U.S.C. § 2501; *Reynolds*, 846 F.2d at 748; *Martinez v. United States*, 48 Fed. Cl. 851, 857 (2001).

1. Accrual of the Claim

Defendant contends that plaintiff's claim accrued no later than December 1992 because the critical events which gave rise to plaintiff's claim had all taken place by that time. See Def.'s Mot. at 1. Defendant argues that EPA's physical occupation of the Property, initial removal of hazardous materials, installation of several monitoring wells, and original fencing off of a large portion of the Property were "'all the events . . . which fix the alleged liability of the defendant.'" Def.'s Mot. at 10 (quoting *Hopland Band*, 855 F.2d at 1577).

Plaintiff responds that its physical takings claim did not accrue until its Property had been "'clearly and permanently taken.'" Pl.'s Opp. at 15 (quoting *Hornback v. United States*, 52 Fed. Cl. 374, 377 (2002) (internal citations omitted)). Plaintiff argues that this permanent taking did not occur until, at the earliest, January 1997 when the Administrative Order became effective, see Compl. at 6, or otherwise in April 1998 when EPA contractors installed the fence around the Area of Institutional Controls. Pl.'s Opp. at 23. Only then, plaintiff contends, did defendant totally exclude plaintiff from a portion of the Property and permanently physically occupy it for public use. *Id.* Before that, plaintiff was permitted access to the Property and in fact used the Area of Institutional Controls for mining purposes as late as December 1996. Compl. at 7; Evatz Decl. ¶ 10.

Determining whether plaintiff's takings claim is time-barred requires the court to ascertain when the

plaintiff's cause of action first accrued. A plaintiff has a "legal right to maintain his or her action" when the plaintiff's cause of action first accrues. *Catawba Indian Tribe of S.C. v. United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993) (quoting 1 Calvin W. Corman, Limitations on Actions § 6.1, at 370-71 (1991)). "It is generally stated that a claim 'first accrues' when all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action." *Hopland Band*, 855 F.2d at 1577. For physical takings cases, "the key date for accrual purposes is that date on which plaintiff's property 'has been clearly and permanently taken.'" *Hornback*, 52 Fed. Cl. at 377 (quoting *Boling v. United States*, 220 F.3d 1365, 1370 (Fed. Cir. 2000)). "During the time when it is uncertain whether the gradual process will result in a permanent taking, the plaintiff need not sue, but once it is clear that the process has resulted in a permanent taking and the extent of the damage is reasonably foreseeable, the claim accrues and the statute of limitations begins to run." *Boling*, 220 F.3d at 1371. Thus, the court must determine when defendant had clearly and permanently physically taken plaintiff's property to identify the date of accrual.

The United States Supreme Court defined what constitutes a permanent physical taking or occupation in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432, 73 L. Ed. 2d 868, 102 S.Ct. 3164 (1982): "Property rights in a physical thing have been described as the rights 'to possess, use, and dispose of it.'" *Id.* at 435 (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378, 89 L. Ed. 311, 65 S. Ct. 357 (1945). "To the extent that the government permanently occupies physical property, it effectively

destroys each of these rights." *Id.* The Court defined the destruction of each of these three core property interests: (1) possession: "the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space," *Id.*; (2) use: "the permanent physical occupation of property forever denies the owner [of] any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property," 458 U.S. at 436; and (3) disposal: "even though the owner may retain the bare legal right to dispose of the occupied space . . ., the permanent occupation of that space . . . will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Id.*; see also *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002). The Court distinguished permanent physical occupations (to which the *Loretto* rule applies) from temporary physical invasions of property by government (to which the *Loretto* rule does not apply):

> The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical invasion is a taking . . . Temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.

458 U.S. at 435 n.12.

This court has found that "a statute that regulates activities on land, such as CERCLA, may effect a per se taking where the regulation necessitates a permanent physical occupation of the subject property." *Scogin v. United States*, 33 Fed. Cl. 285, 290 (1995). However, "the execution of an administrative or court order, although purporting to allow physical occupation of private property, does not by itself constitute a taking of a compensable property right. *Id.* at 291 (citing *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 801 (Fed. Cir. 1993)); *Hendler v. United States*, 952 F.2d 1364, 1375 (Fed. Cir. 1991)). Instead, the focus must be on the actual character of the government action that allegedly physically interfered with the plaintiff's property rights. See Pl.'s Suppl. Br. at 12 (citing *Loretto, 458* U.S. at 426). If the government action, in addition to the order, has effectively extinguished the plaintiff's right to possess, use, and dispose of its property interest, then a permanent physical taking has occurred. *Loretto,* 458 U.S. at 435.

The United States Court of Appeals for the Federal Circuit held that the installation of monitoring wells by the EPA under the authority granted by CERCLA, as here, constituted a *per se* physical taking under *Loretto* of the area on which the wells were installed. *Hendler*, 952 F.2d at 1375; see also *McKay v. United States*, 199 F.3d 1376, 1381 (Fed. Cir. 1999). The *Hendler* decision "rested squarely upon the permanent nature of the wells and the regular government intrusions to monitor them." *Boise Cascade*, 296 F.3d at 1355. The court noted that "there is nothing 'temporary' about the wells the Government installed on plaintiff's property . . . . Years have passed since the Government installed the first wells. The wells are some 100 feet deep, lined with

plastic and stainless steel, and surrounded by gravel and cement . . . . These surveillance wells are at least as 'permanent' in this sense as the CATV equipment in *Loretto* . . . ." *Hendler*, 952 F.2d at 1376. "It is clear that the court . . . meant to focus attention on the *character* of the government intrusion necessary to find a permanent occupation, rather than solely focusing on temporal duration." *Boise Cascade*, 296 F.3d at 1356. Indeed, the *Hendler* court found that "in this context, 'permanent' does not mean forever, or anything like it. A taking can be for a limited term-what is 'taken' is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute." *Hendler*, 952 F.2d at 1376. Thus, even if it did not permanently (in a temporal sense) occupy the property, the areas covered by the wells "involved total occupation" by the government, and therefore the only dispute concerned the amount of compensation to be paid to the displaced owner. *Boise Cascade*, 296 F.3d at 1357.

Drawing from the *Loretto* and *Hendler* analyses, the Federal Circuit has also addressed whether a permanent physical taking occurred despite the fact that the government allowed plaintiff access upon request to the allegedly taken premises. In *767 Third Avenue Associates v. United States*, 48 F.3d 1575 (Fed. Cir. 1995), Sage Realty Corp. entered into leases with organizations from the Socialist Federal Republic of Yugoslavia ("SFRY"). *Id.* at 1576. Shortly after the leases were extended, war erupted in the SFRY and the United States formally acknowledged that the SFRY ceased to exist. *Id.* at 1577. Subsequently, President Bush issued an Executive Order which

"blocked" the properties of SFRY organizations in the United States, including the properties leased from Sage. *Id.* (citing Exec. Order No. 12,808, 57 Fed. Reg. 23,299 (May 30, 1992)). Treasury agents inspected the premises and posted notices denying access for a short period of time. *Id.* at 1577-78. However, on the one occasion after these notices were posted in which Sage requested access to the premises, the government granted the request. *Id.* Sage filed suit in this court alleging a taking of its property, consisting of the benefits of its leases, for which it was entitled to just compensation under the Fifth Amendment. *Id.* This court held that the government "did not take physical possession of the subject premises and Sage was never physically denied access to the property on those occasions when it asked for access." *767 Third Ave. Assocs. v. United States*, 30 Fed. Cl. 216, 222 (1993), *aff'd*, 48 F.3d 1575 (Fed. Cir. 1995). The posting of signs therefore did not constitute a separate physical taking. See *Id.* The Federal Circuit affirmed, stating that "although the notice was backed by the force of law, it did not physically prevent Sage from entering the premises, and access was available when requested." *767 Third Ave. Assocs.*, 48 F.3d at 1583-84. Thus, "the government's actions did not rise to the level of a per se Loretto-type physical taking." *Id.*

In *United States v. Charles George Trucking Co.*, 682 F. Supp. 1260 (D. Mass. 1998), the United States District Court for the District of Massachusetts held that a CERCLA access order sought by EPA did not effect a taking of the defendant's property. *Id.* at 1271. The court found that while EPA's remedial actions to clean up the hazardous waste dump may "work a taking of the defendant's property by something akin to

inverse condemnation," *Id.* at 1271, "if the government determines that it can perform the necessary remedial action without acquisition of the subject property, it need not 'take' the property." *Id.* The court added that only when the implementation of the remedy worked an actual taking of the defendant's property would the defendant then have a justiciable claim for an inverse condemnation. *Id.*

In this case, defendant has not demonstrated that plaintiff's property was "clearly and permanently" taken in 1992 such that its physical takings accrued at that time. See *Boling*, 220 F.3d at 1370. As in *767 Third Avenue*, when plaintiff here protested the erection of the original fences around portions of the Property, defendant immediately allowed plaintiff access to the Property and removed the fences shortly thereafter. Evatz Decl. ¶ 6. Indeed, Edward W. Evatz, president of John R. Sand, included in his Declaration his "Yardage Book" which shows the dates and numbers of yards of stone and sand removed from the Property during the years 1991-1995. See Evatz Decl. ¶ 4; Evatz Decl. Ex. A. Furthermore, he stated that "John R. Sand was mining sand and gravel north of the storage pad (in the area that eventually became known as 'the Area of Institutional Controls') during 1996" and until the Administrative Order was issued denying him access. Evatz Decl. ¶ 10. Finally, as late as June 11, 1997, Evatz toured the Landfill Area (within the Area of Institutional Controls) with his attorney, who took photographs. Evatz Decl. ¶ 11; Evatz Decl. Ex. B-F.

Defendant has therefore failed to meet its burden of showing an absence of any genuine issues of material fact. In particular, defendant has failed to demonstrate that it "destroyed" plaintiff's right to possess, use, or

dispose of the Property or the Area of Institutional Controls upon construction of fences in the winter of 1992-1993. See *Loretto*, 458 U.S. at 434-35. Instead, defendant merely alleges that "plaintiff was deprived to some extent of its 'right to possess, use, and dispose of' its property." Def.'s Reply at 8-9 (quoting *General Motors Corp.*, 323 U.S. at 378) (emphasis added). Being deprived "to some extent" of these rights is not sufficient to constitute a *Loretto*-type physical taking. Indeed, up until the Administrative Order of December 1996, plaintiff had the right to "possess the occupied space himself," *Loretto*, 458 U.S. at 435, and plaintiff certainly made extensive and valuable "use" of the property by continuing its mining and gravel operations on portions of the Property and in the Area of Institutional Controls. See Evatz Decl. ¶ 10; Evatz Decl. Ex. A. Although defendant may have taken away plaintiff's right to exclude, it is "the permanence and absolute exclusivity of a physical occupation" that distinguish physical takings from temporary limitations on the right to exclude. *Loretto*, 458 U.S. at 435 n.12 (emphasis added). "Such temporary limitations are subject to a more complex balancing process to determine whether they are a taking." *Id.* Defendant does not suggest that the court undertake such a balancing test, but merely alleges a permanent physical taking (and thus an accrual date) beginning in the winter of 1992-93 or earlier. Def. Mot. at 10. Based on plaintiff's relevant, competent evidence of continued access to and operations on the Area of Institutional Controls until late 1996, see *Reynolds*, 846 F.2d at 748, defendant has failed to meet its burden of demonstrating an absence of genuine issues of material fact on this matter.

With regard to areas of the Property covered by permanently installed and not abandoned monitoring wells, however, defendant has met its burden. Like the wells in Hendler, "there is nothing 'temporary'" about the permanent wells still in operation that were installed in or about 1989. *Hendler*, 952 F.2d at 1376. Indeed, plaintiff concedes that the monitoring wells identified as "10 series" and "MW-20" "permanently destroyed" some of its property rights under its lease. Pl.'s Supp. Br. at 24; see also Pl.'s Opp. Ex. 6 (map of Property showing location of wells).[10]

Plaintiff correctly points out that "the extent of the taking . . . would be limited to the area taken, e.g., the location of the well or drum pit and possibly an attached access easement." *Id.* (citing *Hendler*, 952 F.2d at 1378). A taking of those individual well areas does not, however, automatically extend or "bootstrap" to become a permanent physical taking of the entire Area of Institutional Controls. See Pl.'s Suppl. Br. at 26. Indeed, "*Hendler's* holding was unremarkable and quite narrow: it merely held that when the government enters private land, sinks 100-foot deep steel reinforced wells surrounded by gravel and concrete, and thereafter proceeds to regularly enter the land to maintain and monitor the wells over a period of years, a per se taking under *Loretto* has occurred." *Boise Cascade*, 296 F.3d at 1357. This per se physical taking is to be limited "to the extent of the occupation," and no more. *Loretto*, 458 U.S. 434-35. Thus, because defendant's "well installation and excavation activities did not permanently destroy any right John R. Sand had in the sand and gravel located nearby," Pl.'s Suppl. Br. at 26, and because plaintiff was able to walk on the land and carry on its mining activities within the Area

of Institutional Controls during the time after defendant claims a physical taking had accrued, *Id.* at 27; Evatz Decl. ¶ 10, defendant has failed to show an absence of any genuine issues of material fact except with regard to the permanent wells.

2. Knowledge of the Existence of the Claim

Defendant further argues that plaintiff's knowledge of the existence of a claim, as evidenced by its repeated letters threatening to exercise its legal rights, is proof that plaintiff was aware of "all the facts necessary to establish the liability of the United States for the alleged taking" in 1992-1994. Def.'s Mot. at 12 (quoting *Fallini v. United States*, 56 F.3d 1378, 1381 (Fed. Cir. 1995); see also Def.'s Reply at 9. Defendant relies on *Coastal Petroleum Co. v. United States*, 228 Ct. Cl. 864, 867 (1981), in which the Court of Claims stated that "once plaintiff is on inquiry that it has a potential claim, the statute of limitations begins to run." Def.'s Mot. at 11.

Plaintiff responds that the letters written by its counsel from 1992-1994 are merely evidence that access issues were being negotiated between the parties during that time and do not show that defendant permanently physically occupied plaintiff's property. Pl.'s PFUF ¶ 19. Despite these letters, plaintiff continued to access and use the Property up until the 1996 Administrative Order. Pl.'s Opp. at 23; Evatz Decl. ¶ 10. Thus, plaintiff contends, its property was not "clearly and permanently taken" until this time. See Pl.'s Opp. at 23; *Hornback*, 52 Fed. Cl. at 377.

The United States Supreme Court has held that "the Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or

new niceties regarding 'causes of action' - when they are born, whether they proliferate, and when they die." *United States v. Dickinson*, 331 U.S. 745, 748, 91 L. Ed. 1789, 67 S. Ct. 1382 (1947). In deciding when a plaintiff's cause of action for a physical takings claim began to accrue, the Court found that even "assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him .... And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized." *Id.* at 749. The Court reasoned that, if a plaintiff were required to bring suit as soon as it realized it had a potential physical takings claim, "other contingencies would be running against him - for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain." *Id.* Thus, "when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or premature litigation to ascertain the just compensation for what is really 'taken.'" *Id.*

The Federal Circuit has not interpreted *Dickinson* to require "that the damages from the alleged taking be complete and fully calculable before the cause of action accrues." *Fallini*, 56 F.3d at 1382. The Federal Circuit relied on *Delaware State College v. Ricks*, 449 U.S. 250, 258, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980), which found that the proper focus, for statute of limitations purposes, "is upon the time of the [defendant's] *acts*, not upon the time at which the *consequences* of the acts become the most painful." *Fallini*, 56 F.3d at 1383; see

also *Nadler Foundry & Mach. Co. v. United States*, 164 F. Supp. 249, 251, 143 Ct. Cl. 92 (Ct. Cl. 1958) (holding that *Dickinson* does not entitle the plaintiff to wait until damage is complete before filing suit). The Federal Circuit further clarified this matter in *Boling*, where the court explained that, properly understood, "stabilization" as discussed in *Dickinson* occurs when "the permanent nature of the taking is evident and the extent of the damage is reasonably foreseeable." 220 F.3d at 1371.

The *Dickinson* line of cases primarily involves takings occasioned by erosion that is traceable to flooding caused by the government. Because erosion caused by flooding is a gradual physical process, the plaintiff must wait to assert its claim until it knows whether the subjection to flooding is so substantial and frequent as to constitute a physical taking requiring just compensation. See, e.g., *Barnes v. United States*, 538 F.2d 865, 210 Ct. Cl. 467 (Ct. Cl. 1976); *Applegate v. United States*, 25 F.3d 1579 (Fed. Cir. 1994); *Boling*, 220 F.3d 1365; see also *Banks v. United States*, 314 F.3d 1304 (Fed. Cir. 2003). Although this case is not factually on all fours with the erosion cases, their fundamental principles provide the court with guidance in determining whether plaintiff's claim accrued, as defendant asserts, in 1992 or earlier, simply because of plaintiff's knowledge of the existence of ~~a~~ potential claim at that time. See Def.'s Mot. at 12.

In making this assertion, defendant relies on several authorities. See Def.'s Mot. at 12 (quoting *Fallini*, 56 F.3d at 1380) ("Plaintiff's were 'cognizant of the facts underlying the alleged taking since long before they filed their complaint in the Court of Federal Claims,'" and thus their claim was time-barred.); Def.'s Mot. at 11

(quoting *Coastal Petroleum*, 228 Ct. Cl. at 867) ("'Once plaintiff is on inquiry that it has a potential claim, the statute of limitations begins to run.'"); Def.'s Reply at 9 (citing *Alaska v. United States*, 32 Fed. Cl. 689 (1995).[11] Defendant's reliance on these cases is misplaced. In each case, the defendant's liability had already "stabilized" within the meaning of *Dickinson*. The "permanent nature" of the taking was evident and damages were reasonably foreseeable at the time the takings claim was found to accrue. See *Boling*, 220 F.3d at 1371.

In *Fallini*, ranchers contended that the government had taken their property by requiring them to provide water to wild horses whenever they gave water to their domestic livestock pursuant to the Wild Free-Roaming Horses and Burros Act. *Fallini*, 56 F.3d at 1380. However, the plaintiffs sued nine years after the enactment of the Act, and "nothing that happened in those later years had the legal effect of triggering, for the first time, the Fallinis' obligation to sue for the alleged takings that had occurred since the enactment of the . . . Act in 1971." *Fallini*, 56 F.3d at 1382. Thus, the plaintiff's claim was time-barred. *Id.*

Similarly, in *Coastal Petroleum*, the Court of Claims held that the plaintiff's claim began to accrue when a canal was constructed over land to which the plaintiff had leased the mineral rights, thereby preventing plaintiff's access to it and other limestone deposits in the surrounding lands. *Coastal Petroleum*, 228 Ct. Cl. at 868. The court found that "the injury to one's mineral rights caused by construction of a Canal over the land in which these rights are leased is obviously knowable." *Id.* at 867. Thus, the plaintiff's claim accrued when the

canal was completed and was time-barred when brought seven years later. *Id.* at 868.

Finally, in *Alaska v. United States*, this court held that the state of Alaska's takings claim based on the Export Administration Act of 1979, which prevented its export of crude oil transported over the Trans-Alaska Pipeline System (TAPS), was time-barred when brought in 1992. *Alaska*, 32 Fed. Cl. at 693-94. The court observed that "the export ban on TAPS oil has been completely stable since 1979. It has been in continuous effect and has not been substantively altered or modified . . . ." *Id.* at 700.

Unlike these cases, defendant's actions that allegedly took plaintiff's Property in this case were neither indisputably "stabilized" or of a "permanent nature" in 1992. Here, unlike *Fallini*, both parties' use of the Property changed subsequent to the erection of the original fences. Cf. *Fallini*, 56 F.3d at 1382. After being temporarily denied access to the Property, plaintiff demanded access and defendant granted it immediately. Evatz Decl. ¶ 6. Shortly thereafter the offending fences were moved. *Id.* Furthermore, unlike *Coastal Petroleum*, plaintiff here has not been shown to have been permanently denied any of its mineral rights, including access to sand or gravel in the Area of Institutional Controls, until the end of 1996. Evatz Decl. ¶ 10. Lastly, unlike *Alaska v. United States*, defendant's physical occupation of the Property and denial of plaintiff's access pursuant to the First ROD and the 1992-93 erection of fences was not "in continuous effect." Cf. *Alaska*, 32 Fed. Cl. at 700. Nor were defendant's activities without "substantive[] alterations or modifications" from time to time. Cf. *Id.*

Instead, defendant's actions which amount to an alleged physical taking are more analogous to the "continuing process of physical events" addressed in *Dickinson*. *Dickinson*, 331 U.S. at 749. EPA's activities on plaintiff's Property do not appear to the court to have been "stabilized" or "permanent in nature" for summary judgment purposes in 1992 or earlier. Fences were subsequently moved and removed. Evatz Decl. ¶ 6. The metes and bounds of the Landfill Cap were not yet defined. Pl.'s Suppl. Br. at 3. The Area of Institutional Controls had not been defined or implemented. *Id.* Profitable mining and gravel activities continued. Evatz Decl. ¶¶ 4, 10. Wells installed were later abandoned. Pl.'s Suppl. Br. at 7. Moreover, the Second ROD was subsequently amended in August of 1996 and was not implemented until the Administrative Order in December of 1996. Compl. at 5-6. Thus, although plaintiff appears to have known it had a potential takings claim, as shown by the letters written by its counsel in 1992-94, this is "not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him." *Dickinson*, 331 U.S. at 749.

Plaintiff has provided sufficient evidence that it continued its gravel and mining operations throughout the 1990s and into 1996. See Evatz Decl. ¶ 10; Evatz Decl. Ex. A. Until December 1996, when EPA issued the Administrative Order which finally defined the metes and bounds of the Area of Institutional Controls and prohibited plaintiff's access by threat of a $ 25,000 a day penalty for noncompliance, see Compl. at 6-7, plaintiff continuously (excepting only temporary impediments) had access to much of the Property and was able to make valuable use of it, including use of the

Area of Institutional Controls. Evatz Decl. ¶¶ 4, 8, 10. In these circumstances, the court cannot find that it was "evident" to plaintiff that the nature of defendant's taking was permanent in 1992-1996. See *Boling*, 220 F.3d at 1371; *Fallini*, 56 F.3d at 1382.

Nor can the court find that plaintiff's right to possess, use, and dispose of the Property within the Area of Institutional Controls had been destroyed before May 20, 1996, the date six years before plaintiff's complaint was filed. See *Loretto*, 458 U.S. at 434-35. Although the date of first accrual is a matter of law, see *Boling*, 220 F.3d at 1370-71, the court is mindful that takings jurisprudence is "uniquely fact intensive." *Ewald v. United States*, 14 Cl. Ct. 378, 382 (1988) (quoting *Juda v. United States*, 6 Cl. Ct. 441, 450 (1984)). Thus, "'denial of a taking claim on the basis of the defense of limitations is warranted only when the facts alleged demonstrate conclusively that such a decision is required as a matter of law.'" *Id.* The facts before the court at this juncture, except with respect to the permanent monitoring wells, do not constitute such a conclusive demonstration. The court need not now decide exactly when plaintiff's claim first accrued. The court finds, however, that defendant has failed to meet its burden of demonstrating the absence of any genuine issues of material fact entitling it to judgment that plaintiff's claim is time-barred.

III. Conclusion

For the foregoing reasons, defendant's motion for summary judgment that plaintiff's complaint is time-barred is DENIED, except with respect to the monitoring wells not abandoned and still in operation, as to which it is GRANTED. Accordingly, the court

LIFTS its stay of briefing on Plaintiff's Motion and Brief for Partial Summary Judgment on Liability (Plaintiff's Motion). The parties shall resume briefing on Plaintiff's Motion in accordance with the Rules of the Court of Federal Claims as if Plaintiff's Motion had been filed on the date of this Opinion and Order.

IT IS SO ORDERED.

EMILY C. HEWITT

Judge

Footnotesn1 The court has before it Defendant's Motion for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment, and Memorandum in Support Thereof (Def.'s Mot.); Plaintiff's Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings, or, in the Alternative, Motion for Summary Judgment (Pl.'s Opp.); Defendant's Reply in Support of its Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment (Def.'s Reply); Defendant's Proposed Findings of Uncontroverted Fact (Def.'s PFUF); Plaintiff's Responses to Defendant's Proposed Findings of Uncontroverted Fact (Pl.'s PFUF Resp.); Plaintiff's Additional Proposed Findings of Uncontroverted Fact (Pl.'s PFUF); Defendant's Responses to Plaintiff's Proposed Findings of Uncontroverted Fact (Def.'s PFUF Resp.); Defendant's Supplemental Briefing in Support of its Motion for Judgment on the Pleadings, or, in the Alternative, for Summary Judgment (Def.'s Suppl. Br.); and Plaintiff's Supplemental Brief on the Accrual of a Physical Taking Claim (Pl.'s Suppl. Br.).

n2 Facts cited to the filing of only one party do not appear to be in dispute.

n3 Plaintiff's Property is rectangular in shape and contains an access road running north-south slightly west of its center. See Pl.'s Opp. Exhibit (Ex.) 6 (detailed map of Property). Plaintiff's primary operations area is located in the center of the Property and just to the east of the access road. See Pl.'s Suppl. Br. Ex. 20 (map indicating operations area). The operations area consists of a garage, an electrical shed, a storage shed, a crushing and wash plant, a supply pond, customer access roads, and a surge pile. *Id.*; see also Pl.'s Opp. Ex. 6 (detailed map of Property); Transcript of Oral Argument (Tr.) Feb. 19, 2003, at 27-28; Compl. at 3-4. Plaintiff refers to this area as its "plant area." (Plant Area). Compl. at 4. The surge pile is on the southern end of the Plant Area. See Pl.'s Opp. Ex. 6. A sand and gravel pit is located to the southeast of the Plant Area. See *id.*; Pl.'s Suppl. Br. Ex. 20. Sand and gravel is moved northwest from the pit to the surge pile by a conveyor belt. Tr. at 29; Pl.'s Opp. Ex. 6. From there, another conveyor belt conveys the sand and gravel from the top of the surge pile north to the crushing and wash plant. *Id.*

n4 EPA used the storage pad to facilitate the excavation and removal of drums of hazardous waste and contaminated soil by storing them there for pickup. Def.'s Suppl. Br. at 7. EPA abandoned the storage pad in 1994, and since then plaintiff has made "full use" of it. Pl.'s Opp. Ex.17 ¶ 9 (Declaration of Edward W. Evatz, Jr.) (Evatz Decl.).

n5 The fences enclosed approximately sixty percent of the Property, including most of the Property lying east of the access road. See Compl. Ex. 7. They closed off all of the Plant Area as well as the sand and gravel pit. Evatz Decl. ¶ 6. The fences also temporarily prevented

plaintiff from accessing or engaging in mining activities in the area containing the Landfill. Def.'s Mot. at 5; (citing Def.'s Mot. Ex. 3 ¶ 2 (Declaration Linda M. Nachowicz) (Nachowicz Decl.)); see also Compl. Ex. 7.

n6 On March 17, 1993, EPA and a group of defendants (Settling Defendants) entered into a consent decree (Consent Decree) in the action *United States v. BASF-Inmont Corp.*, 819 F. Supp. 601 (E.D. Mich. 1993). See Compl. at 5. Plaintiff is not a party to the Consent Decree. *Id.* In the Consent Decree, Settling Defendants agreed to perform the remediation of the Landfill. Compl. at 5.

n7 See supra note 6.

n8 The Area of Institutional Controls is located primarily in the northeastern portion of the Property. See Compl. Ex. 8.

n9This decision was reversed in part on other grounds by *Franconia Assocs. v. United States*, 536 U.S. 129, 153 L. Ed. 2d 132, 122 S. Ct. 1993 (2002).

n10 Plaintiff does argue, however, that the "17 series" of monitoring wells that were originally installed within the Landfill and subsequently removed or abandoned "cannot be seen to constitute a permanent taking" because they no longer affect plaintiff's exercise of its property rights. Pl.'s Suppl. Br. at 24. Thus, plaintiff contends, its takings claim for any space temporarily occupied by these abandoned wells has not yet accrued. See *id.* at 30. However, "all takings are 'temporary,' in the sense that the government can always change its mind at a later time, and this is true whether the property interest taken is a possessory estate for years or a fee simple acquired through condemnation, or an easement of use by virtue of a regulation." *Hendler*, 952

F.2d at 1376. It appears to the court that, under *Hendler*, a taking by the installation of a well would ordinarily occur immediately upon the well's construction and resulting exclusion of a plaintiff. See *Id.* Accordingly, six years after this stabilized and total destruction of a plaintiff's property rights, plaintiff's physical takings claim for that well area is time-barred. Thus, regardless of whether a well has been or will be eventually abandoned or removed, if plaintiff's claim is brought more than six years after the well's construction, *Hendler* instructs that the well installation constituted a physical taking that has accrued and is time-barred. See *Id.*; see also *Alliance of Descendants of Tex. v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994) (holding that a claim under the *Fifth Amendment* accrues when the taking action occurs). That is not to say, however, that an area previously taken by a now-abandoned monitoring well could not be taken again by the construction of the Landfill Cap over the area in which the abandoned monitoring well once existed. Cf. *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994).

n11 In *Alaska v. United States*, the court stated that "there is a critical difference between knowing of a potential claim and being certain that one will prevail on the merits at trial. The former, and not the latter, is sufficient to start the running of the statute of limitations." *Alaska*, 32 Fed. Cl. at 701.

05-5033

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOHN R. SAND & GRAVEL COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

November 30, 2006, Decided

November 30, 2006, Filed

ORDER

A petition for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

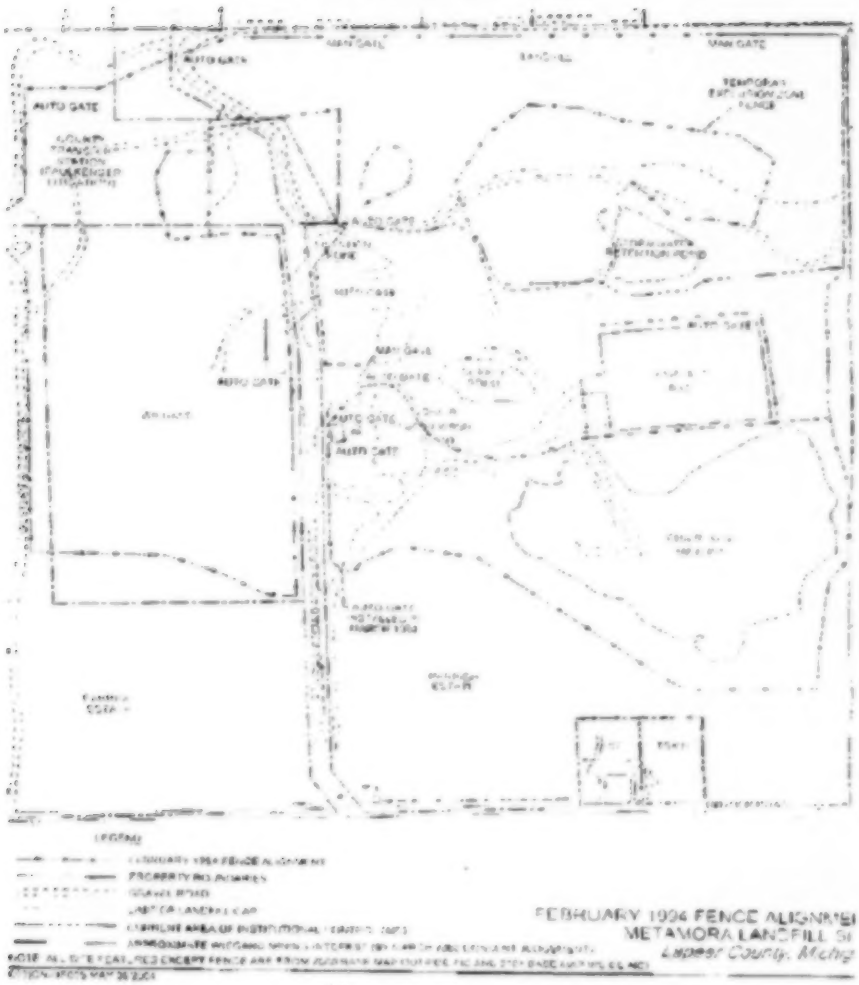
ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

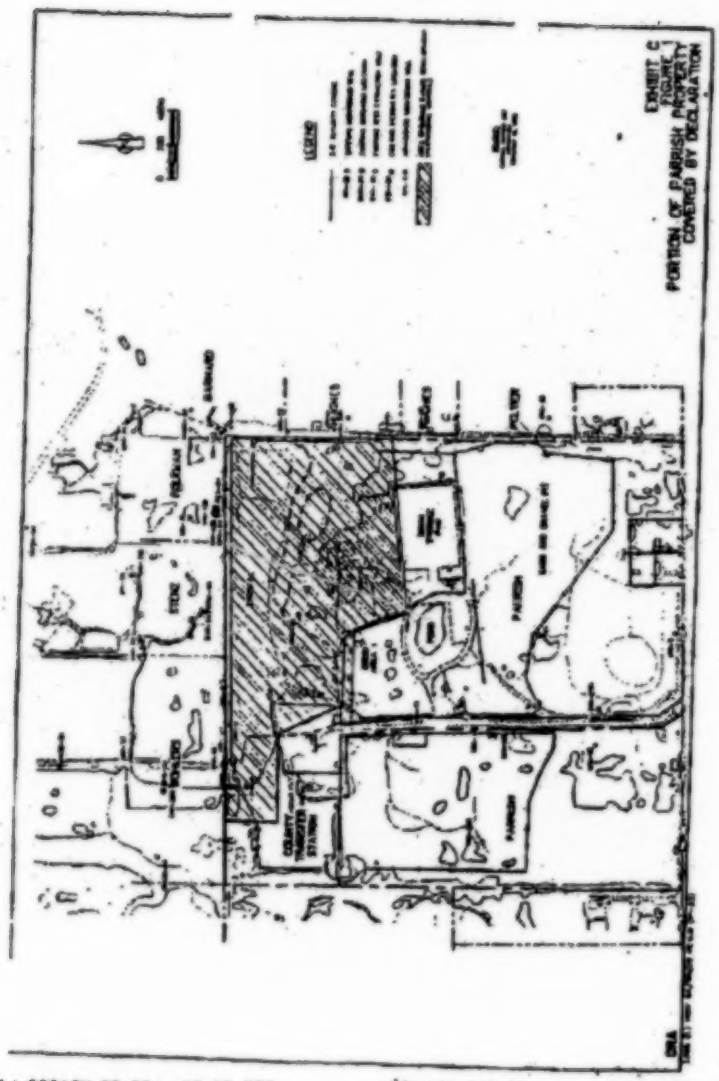
ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on December 7, 2006.

157a

Appendix A





DEC 5 '96 18:312-332-8932 DEC 30'96 10:20 No.003 P.23

Supreme Court, U.S.
FILED
APR 27 2007
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No. 06-1164

In the Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred by addressing the timeliness of petitioner's complaint even though the government did not argue on appeal that the suit was barred by the six-year limitations period contained in 28 U.S.C. 2501.

2. Whether the court of appeals erred in holding that petitioner's complaint was time-barred.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 12
Block v. *North Dakota*, 461 U.S. 273 (1983) 7, 8
Day v. *McDonough*, 126 S. Ct. 1675 (2006) 6, 15
De Arnaud v. *United States*, 151 U.S. 483 (1894) 9
Eberhart v. *United States*, 546 U.S. 12 (2005) 12
FDIC v. *Meyer*, 510 U.S. 471 (1994) 7
Finn v. *United States*, 123 U.S. 227 (1887) 8, 9, 13
Franconia Assocs. v. *United States*, 536 U.S. 129 (2002) 10, 11
Hendler v. *United States*, 952 F.2d 1364 (Fed. Cir. 1991) 16
Hornback v. *United States*, 52 Fed. Cl. 374 (2002) 4
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 10, 11
Kendall v. *United States*, 107 U.S. 123 (1883) 8
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 12
Laber v. *Harvey*, 438 F.3d 404 (4th Cir. 2006) 14
Lorillard v. *Pons*, 434 U.S. 575 (1978) 10

Cases—Continued: Page

Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) 5
Martinez v. *United States*, 333 F.3d 1295 (Fed. Cir. 2003), cert. denied, 540 U.S. 1177 (2004) 14
Munro v. *United States*, 303 U.S. 36 (1988) 9
Peters v. *Hobby*, 349 U.S. 331 (1955) 15
Scarborough v. *Principi*, 541 U.S. 401 (2004) 12
Soriano v. *United States*, 352 U.S. 270 (1957) 9
United States v. *Mitchell*, 463 U.S. 206 (1983) 7, 8
United States v. *Sherwood*, 312 U.S. 584 (1941) 7, 8
United States v. *Wardwell*, 172 U.S. 48 (1898) 9
Wisniewski v. *United States*, 353 U.S. 901 (1957) 13

Constitution, statutes and rules:

U.S. Const. Amend. V 5
Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767 9
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 12
42 U.S.C. 2000e-16(c) 14
Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* 2
28 U.S.C. 2107 15
28 U.S.C. 2501 ..... *passim*
Fed. R. App. P. 4(a) 15
Fed. R. Crim. P. 33 12

In the Supreme Court of the United States

No. 06-1164

JOHN R. SAND & GRAVEL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 457 F.3d 1345. The opinion of the Court of Federal Claims (CFC) (Pet. App. 41a-126a) following a bench trial is reported at 62 Fed. Cl. 556. The opinion of the CFC on cross-motions for summary judgment is reported at 60 Fed. Cl. 230. The opinion of the CFC (Pet. App. 127a-154a) on the United States' motion for judgment on the pleadings or, in the alternative, for summary judgment is reported at 57 Fed. Cl. 182.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2006. A petition for rehearing was denied on November 30, 2006 (Pet. App. 155a-156a). The petition

for a writ of certiorari was filed on February 26, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner's complaint alleged that the United States had physically taken petitioner's leasehold, without paying just compensation, during the remediation of a hazardous waste site pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* The CFC dismissed a portion of petitioner's complaint, holding that it was barred by the six-year statute of limitations contained in 28 U.S.C. 2501. Pet. App. 150a. After a bench trial on liability with respect to the remainder of petitioner's complaint, the CFC entered judgment for the United States. *Id.* at 113a-114a. The court of appeals vacated and remanded with instructions to dismiss, holding that the CFC lacked jurisdiction over the entirety of petitioner's suit because petitioner's claims had accrued more than six years before the complaint was filed. *Id.* at 1a-40a.

1. In 1969, petitioner entered into a 50-year sand and gravel lease that granted it the exclusive right to mine marketable stone and gravel on a 158-acre parcel of land (the Site) in Lapeer County, Michigan. Pet. App. 2a-3a. The Site contained a landfill that operated from 1955 until 1980. *Id.* at 3a-4a, 45a. While it was in operation, the landfill illegally accepted drums of liquid industrial waste and twice caught fire. *Id.* at 4a; C.A. App. 1796-1799, 1994, 2005, 2014, 2320.

Petitioner and the landfill's operator entered into a cooperative arrangement. Under that arrangement, the operator notified petitioner when it located "good" sand

or gravel in the course of digging for the landfill so that petitioner could remove the sand or gravel. Pet. App. 66a. Petitioner, in turn, conducted its mining operations slightly ahead of the growing landfill, leaving empty space that could be filled with garbage. *Ibid.* On at least two occasions, petitioner's president observed trucks dumping barrels into the landfill. *Id.* at 67a-69a.

In 1986, the United States Environmental Protection Agency (EPA) issued its initial remedy for excavating and removing the contaminated drums at the Site. Pet. App. 4a. In 1990, EPA issued its decision for remediation of the groundwater contamination and capping of the landfill. *Id.* at 4a-5a. During the winter of 1992-1993, in connection with the 1990 decision, EPA erected a chain link fence that enclosed approximately 60% of the Site. *Id.* at 5a. In February 1994, EPA constructed a new internal security fence that "encompassed the overwhelming portion of [petitioner's] leasehold." *Id.* at 6a. Over the following years, EPA moved the fence on several occasions, with the relocations typically resulting in a reduction of the area encompassed. *Id.* at 5a-7a.

In May 1998, the fence was realigned, enclosing the Area of Institutional Controls (AIC), an area to protect individuals from future exposures and ensure the integrity of the landfill cap system. Pet. App. 6a; C.A. App. 3106. The May 1998 fence remained in place throughout the construction of the landfill cap. *Id.* at 1426-1427. In December 2003, EPA moved the fence inward to enclose a smaller area, which currently comprises the AIC and includes the landfill cap system. Pet. App. 90a. During the relevant period, petitioner repeatedly interfered with EPA's remediation activities at the Site. See *id.* at 6a; C.A. App. 1499-1511, 3574-3582.

2. In May 2002, petitioner filed suit in the CFC, alleging a taking of its leasehold and seeking just compensation. Pet. App. 7a. Petitioner alleged "that the EPA's construction of the landfill cap, occupation of the AIC, construction of fences and access roads, and installation of groundwater monitoring wells amounted to a permanent physical taking." *Ibid.* The government moved for judgment on the pleadings or, in the alternative, for summary judgment. The government argued that petitioner's suit was barred by 28 U.S.C. 2501, which provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The United States contended that petitioner's claim had accrued during the winter of 1992-1993 when EPA had erected fences on the property, and that the 2002 complaint was therefore untimely. Pet. App. 129a-133a.

The CFC granted the government's motion in part and denied it in part. Pet. App. 127a-154a. The CFC concluded that petitioner's takings claim had accrued on the "date on which [petitioner's] property ha[d] been clearly and permanently taken," and that the government had "failed to demonstrate that it 'destroyed' [petitioner's] right to possess, use, or dispose of the [Site] or the [AIC] upon construction of fences in the winter of 1992-1993." *Id.* at 136a, 141a-142a (quoting *Hornback* v. *United States*, 52 Fed. Cl. 374, 377 (2002)). The CFC held, however, that petitioner's claim with respect to areas covered by permanently installed monitoring wells that had not been abandoned was time-barred. *Id.* at 143a.

The parties then filed cross-motions for summary judgment on the merits. The government argued that,

under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), it had not taken any Fifth Amendment-protected property interest of petitioner because petitioner's mining in the AIC was barred by pre-existing background principles of state nuisance and property law. The CFC "agreed with the government's contention that background principles of Michigan nuisance and property law limit the scope of compensable property interests in a physical takings case such as [petitioner's]," Pet. App. 9a, but it found the record as to the applicable "background principles" insufficient to grant the government's motion for summary judgment, see *id.* at 9a-10a.

After a bench trial on liability, the CFC entered judgment for the government. Pet. App. 41a-126a. The CFC concluded that petitioner's takings claim had accrued in May 1998. *Id.* at 50a-52a. The CFC held that petitioner was not entitled to compensation because it had acquired its lease "[s]ubject to the [l]andfill," and had effectively consented to any restriction on its leasehold resulting from the landfill's operations, *id.* at 63a-73a. The CFC explained that petitioner's "contribution to the creation of a landfill containing a hazardous waste site makes the loss of a portion of [petitioner's] property during the remediation of that site a burden which it is fair to allow [petitioner] to bear, rather than shifting [petitioner's] loss to the public as a whole." *Id.* at 72a-73a. As an additional ground for its decision, the CFC also held that mining by petitioner was prohibited by background principles of state nuisance and property law. *Id.* at 73a-113a.

3. The court of appeals vacated and remanded with instructions to dismiss. Pet. App. 1a-40a.

a. Although the government did not argue in the court of appeals that petitioner's complaint was untimely, the issue was raised in a brief filed by an amicus curiae, and petitioner addressed the timeliness of the complaint in its reply brief. See Pet. App. 13a-14a. The court of appeals held that it was required to address the question because 28 U.S.C. 2501 limits the jurisdiction of the CFC. See Pet. App. 15a-20a. The court of appeals acknowledged and distinguished recent decisions of this Court that have held a variety of timing requirements to be non-jurisdictional in character. See *id.* at 17a-18a. The court explained that, "[i]n contrast to a non-jurisdictional claim-processing rule or the statute of limitations in [*Day* v. *McDonough*, 126 S. Ct. 1675 (2006)], section 2501 sets forth a condition that must be met for a waiver of sovereign immunity in a suit for money damages against the United States." *Ibid.* The court also observed that

> the six-year statute of limitations of section 2501 enjoys a longstanding pedigree as a jurisdictional requirement. Since 1883 when [this] Court first held that the statute of limitations was jurisdictional in *Kendall v. United States*, 107 U.S. 123 (1883), [this] Court has consistently maintained that the time limit is jurisdictional and therefore cannot be waived.

Id. at 18a (citations omitted).

b. The court of appeals held that petitioner's claim accrued no later than September 1994 and that petitioner's complaint was therefore untimely. Pet. App. 23a-28a. The court stated that the fence erected by EPA in 1994 "destroyed [petitioner's] right to exclude others from its leasehold" and "inhibited [petitioner's] right to use its property free of interference." *Id.* at

24a. The court further explained that the fence remained on the Site from that time forward, even though the fence's precise location was changed from time to time. *Id.* at 24a-25a.

c. Judge Newman dissented. Pet. App. 33a-40a. She would have held that the limitations period established by Section 2501 "is not itself a matter of jurisdiction," *id.* at 33a, and that the timeliness of petitioner's complaint therefore "need not be considered *sua sponte*" when the government did not raise it on appeal, *id.* at 38a. Judge Newman further stated that she "would affirm the holding of the [CFC] that the limitations period had not accrued in 1994, and would reach the merits of the takings claim." *Id.* at 39a. On the merits, she would have affirmed the CFC's judgment on the ground that petitioner was not entitled to compensation because it was aware of the landfill when it acquired its leasehold. *Id.* at 40a.

ARGUMENT

1. Petitioner contends (Pet. 11-20) that the court of appeals erred in treating the six-year limitations period established by Section 2501 as a jurisdictional rule. That claim lacks merit and does not warrant this Court's review.

a. The court of appeals correctly held that Section 2501 is jurisdictional and cannot be waived by the parties. This Court has repeatedly recognized that "[t]he basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983); see *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983); *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994). Thus,

"the existence of consent [to be sued] is a prerequisite for jurisdiction," *Mitchell*, 463 U.S. at 212, and "the terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit," *Sherwood*, 312 U.S. at 586. "When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity." *Block*, 461 U.S. at 287.

The court of appeals' conclusion that Section 2501 establishes a jurisdictional rule accords with those general principles and with this Court's consistent treatment of Section 2501 and its statutory predecessors in a series of decisions beginning with *Kendall* v. *United States*, 107 U.S. 123 (1883). In *Kendall*, the Court explained that Congress had restricted the jurisdiction of the Court of Claims to certain classes of cases, and that if a particular claim is not such a case, "it is the duty of the court to raise the question whether it is done by plea or not." *Id.* at 125. The Court specifically identified the statutory time bar as one of the restrictions the court must raise even if it has not been raised by plea. *Ibid.*

Similarly in *Finn* v. *United States*, 123 U.S. 227 (1887), the Court explained:

> The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defence, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers

> to waive the limitation imposed by statute upon suits against the United States in the Court of Claims.

Id. at 232-233. In *Munro* v. *United States*, 303 U.S. 36 (1938), the Court applied the same rule to a Tucker Act suit in district court where the attorney for the government had failed to plead the six-year bar in a timely manner. Citing *Finn*, the Court held that "[t]he District Attorney had no power to waive conditions or limitations imposed by statute in respect of suits against the United States." *Id.* at 41; see *De Arnaud* v. *United States*, 151 U.S. 483, 495-496 (1894) (quoting *Finn*, 123 U.S. at 232-233); *United States* v. *Wardwell*, 172 U.S. 48, 52 (1898) (stating that the predecessor to Section 2501 was "not merely a statute of limitations but also jurisdictional in its nature, and limiting the cases of which the Court of Claims can take cognizance"); *Soriano* v. *United States*, 352 U.S. 270, 271 (1957) (holding that "the Court of Claims lack[ed] jurisdiction because the claim was not filed within the period provided by the statute"); Pet. App. 18a-19a (citing cases).

For purposes of the question presented here, the text of current Section 2501 is not meaningfully different from the language construed in those prior decisions.[1] The minor modifications adopted by Congress in various amendments to the statute do not suggest an intent to

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[1] The earliest of Section 2501's statutory antecedents provided in pertinent part:

> [E]very claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues.

Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767.

supersede this Court's earlier rulings that the limitations period is jurisdictional in character. To the contrary, the fact that Congress has refined the statutory language in other respects without calling that principle into question is a reason to adhere to this Court's prior construction of the law. Cf. *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

b. Petitioner acknowledges (see Pet. 11-12) the precedents discussed above but contends (Pet. 12-13) that they have been undermined by this Court's more recent decisions in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), and *Franconia Associates* v. *United States*, 536 U.S. 129 (2002). In neither *Irwin* nor *Franconia Associates*, however, did this Court address the question whether Section 2501 or any other statutory limitations period governing suits against the United States is jurisdictional in nature.

The statutory provision at issue in *Irwin* required that an employment discrimination complaint against the federal government be filed within 30 days of receipt of notice of final action taken by the Equal Employment Opportunity Commission. See 498 U.S. at 92. While recognizing that the 30-day filing requirement was "a condition to the waiver of sovereign immunity and thus must be strictly construed," *id.* at 94, this Court concluded that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States," *id.* at 95-96. The Court stated that "[s]uch a principle is likely to be a realistic assessment of legislative intent as

well as a practically useful principle of interpretation." *Id.* at 95.

This Court's decision in *Irwin* does not speak directly to the question presented here. The Court characterized its decision as adopting a "general rule to govern the applicability of equitable tolling in suits against the Government." 498 U.S. at 95. The Court did not purport to resolve other issues concerning the application of statutory time limits in suits against the government, and it did not discuss the question whether such limits are jurisdictional in nature.

Petitioner's reliance (Pet. 12-13) on *Franconia Associates* is similarly misplaced. The Court in *Franconia Associates* rejected the contention "that § 2501 creates a special accrual rule for suits against the United States." 536 U.S. at 145. Rather, the Court held, the determination of when a claim against the government "first accrues" within the meaning of Section 2501 is governed by the same accrual principles that would apply in a like suit between private parties. See *ibid.* But while the Court expressed the view that "limitations periods should *generally* apply to the Government 'in the same way that' they apply to private parties," *ibid.* (emphasis added) (quoting *Irwin*, 498 U.S. at 95), it did not announce a categorical rule to that effect, and it had no occasion to decide whether a timeliness objection may be waived if the government fails to assert it. In neither *Irwin* nor *Franconia Associates*, moreover, did this Court announce the overruling of any of its precedents—a step that would have been necessary for the Court to hold that the untimeliness of a complaint filed in the CFC may be overlooked if the government does not raise the point.

c. Petitioner contends (Pet. 13-14) that the court of appeals' ruling conflicts with this Court's recent decisions in *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam), *Scarborough* v. *Principi*, 541 U.S. 401 (2004), and *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), which held various timing requirements to be non-jurisdictional. The timing requirements at issue in those cases, however, did not pertain to the initiation of a lawsuit, but instead governed various subsidiary determinations made by federal courts in cases that they were indisputably authorized to decide. See *Eberhart*, 546 U.S. at 13 (time limit for filing a motion for new trial under Federal Rule of Criminal Procedure 33); *Scarborough*, 541 U.S. at 405 (statutory provision governing timing and content of application for attorneys' fees by prevailing party in suit against the United States); *Kontrick*, 540 U.S. at 446 (time limit under Bankruptcy Rules for creditor to object to the debtor's discharge). Section 2501, by contrast, speaks to the question whether the CFC may adjudicate petitioner's claims *at all*. It is therefore far more naturally characterized as jurisdictional than were the provisions at issue in *Eberhart*, *Scarborough*, and *Kontrick*.[2]

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[2] As petitioner observes (Pet. 14), this Court stated in *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006), that "time prescriptions, however emphatic, 'are not properly typed "jurisdictional."' " *Id.* at 510 (quoting *Scarborough*, 541 U.S. at 414). That statement was dictum, however, since the statutory provision at issue in *Arbaugh* did not impose a time limit. Rather, the Court in *Arbaugh* considered Title VII's definition of "employer," which limits the term to persons with 15 or more employees. See *id.* at 504-505. The Court concluded that "the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief" on the merits rather than a prerequisite to the district court's exercise of jurisdiction. *Id.* at 516; see *id.* at 510-516.

Petitioner also relies (Pet. 14-15) on decisions of this Court holding that statutes of limitations are not ordinarily considered jurisdictional. In *Finn*, this Court acknowledged "[t]he general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions." 123 U.S. at 232-233. The Court explained, however, that this rule "has no application to suits in the Court of Claims against the United States" because "the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims." *Id.* at 233; see pp. 8-9, *supra*. More recent cases that simply reaffirm the general rule therefore do not cast doubt on the Court's prior holdings that the six-year limitations period established by Section 2501 for suits against the United States for a money judgment, unlike limitations periods governing litigation between private parties, is jurisdictional in character.

d. Petitioner contends (Pet. 17-19) that the court of appeals' decision conflicts with rulings of other circuits.[3] Petitioner states (Pet. 17) that other courts of appeals "have construed *Irwin* to mean that compliance with a statute of limitations generally is not a jurisdictional prerequisite to suing the government in the absence of a clear Congressional statement." But while some of the decisions cited by petitioner state that deadlines for bringing suit against the United States are not "juris-

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In the instant case, by contrast, petitioner does not contend that Section 2501 speaks to the merits of its claim.

[3] Petitioner's further assertion (Pet. 15-17) of an intra-circuit conflict provides no basis for this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

dictional," only one of those decisions specifically addresses the question whether a plaintiff's non-compliance with such deadlines may be waived by government counsel's failure to raise the issue.

That case is *Laber* v. *Harvey*, 438 F.3d 404 (4th Cir. 2006), in which the court addressed the same statutory deadline (42 U.S.C. 2000e-16(c)) that was at issue in *Irwin*. The court in *Laber* explained that this Court had construed Section 2000e-16(c) to permit equitable tolling. 438 F.3d at 429 n.25. The court then stated that, "[i]f equitable tolling applies, which it does, the time limits are not jurisdictional, but are rather in the nature of a statute-of-limitations defense." *Ibid.* That conclusory analysis is flawed, since the question whether Congress intended equitable tolling to be available is logically distinct from the question whether a statutory deadline for bringing suit against the United States is jurisdictional and therefore non-waivable. See *Martinez* v. *United States*, 333 F.3d 1295, 1317 (Fed. Cir. 2003), cert. denied, 540 U.S. 1177 (2004).

In any event, *Laber* did not involve 28 U.S.C. 2501, and the Fourth Circuit did not adopt a categorical rule that deadlines for bringing suit against the government are non-jurisdictional. Rather, it treated such deadlines as *presumptively* non-jurisdictional, and found nothing that would rebut the presumption with respect to 42 U.S.C. 2000e-16(c). See 438 F.3d at 429 n.25. Even under that approach, the fact that Congress has repeatedly refined Section 2501 without disturbing this Court's understanding of Section 2501 and its predecessors as jurisdictional would rebut any such presumption here.

e. Petitioner's argument depends on the proposition that, if the six-year limitations period prescribed by Section 2501 is not jurisdictional, the court of appeals was

precluded from inquiring into the timeliness of petitioner's complaint when the government failed to raise the point on appeal. That is incorrect. As this Court recognized in *Day* v. *McDonough*, 126 S. Ct. 1675, 1681-1682 (2006), the non-jurisdictional character of a statute of limitations may mean that a federal court has no *obligation* to consider timeliness issues sua sponte, but it does not foreclose the court from doing so. That is particularly true where, as here, the court of appeals would otherwise have been required to decide a constitutional question. See, *e.g.*, *Peters* v. *Hobby*, 349 U.S. 331, 338 (1955). In addition, an amicus curiae argued in the court of appeals that petitioner's complaint was untimely, and petitioner responded to that argument in its Federal Circuit reply brief. See Pet. App. 13a-14a. The government's failure to raise the issue therefore did not deprive petitioner of an adequate opportunity to address the question of its compliance with Section 2501.

f. For the foregoing reasons, the question whether Section 2501's six-year limitations period is jurisdictional in nature does not warrant review by this Court. On March 26, 2007, this Court heard oral argument in *Bowles* v. *Russell*, No. 06-5306. *Bowles* presents the question whether 28 U.S.C. 2107 and Federal Rule of Appellate Procedure 4(a), which limit the time for filing a notice of appeal in a federal civil case, establish a jurisdictional rule.

At a general level, both *Bowles* and this case involve issues concerning whether particular timing requirements are jurisdictional in character. But because *Bowles* does not involve a statutory provision governing the time for filing suit against the United States, the Court should have no occasion to address the question presented here, which is governed by a long series of

decisions of this Court specifically treating the limitation in 28 U.S.C. 2501 and its predecessors as jurisdictional in nature. There is accordingly no reason for the Court to hold the petition in this case pending its decision in *Bowles*.

2. Petitioner contends (Pet. 20-23) that the court of appeals erred in holding that its takings claims was untimely. That argument raises no question of broad legal importance.

a. Petitioner argues (Pet. 20-22) that the court of appeals' decision blurs the distinction between permanent and temporary physical taking claims. The court of appeals correctly recognized, however, that the term "permanent" in this context "does not mean forever, or anything like it." Pet. App. 22a (quoting *Hendler* v. *United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991)). The question whether a governmental presence on private land is sufficiently longstanding and intrusive to constitute a permanent taking is one of degree, and it is not ordinarily resolvable by reference to a bright-line rule. See *id.* at 23a (explaining that the "determination of whether government occupancy is 'permanent' is highly fact-specific"); *Hendler*, 952 F.2d at 1377. Petitioner asserts (Pet. 22) that "[t]he Federal Circuit's analysis overlooks several key facts found by the [CFC]." But any error in the court of appeals' application of established legal principles to the record in this case presents no question warranting this Court's review.

b. Petitioner construes the court of appeals' decision to hold that, "if the government installs objects on some portion of private property, the property owner's taking claim accrues for the government's later permanent occupation of *any other* portion of the property." Pet. 22

(citation and internal quotation marks omitted); see Pet. 22-23. The court of appeals did not adopt any such broad rule. Rather, the court found it decisive that an EPA security fence remained on the Site from 1994 onward. Pet. App. 23a-25a. The court held that "[t]he EPA's willingness to alter the parameters of the fence does not change the fact that the fence itself was permanent in nature." *Id.* at 24a. The court thus concluded that the essential character of the government's incursion on petitioner's right to use its property and exclude others from it remained consistent, even though the degree of that incursion changed over time. That record-specific determination does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 06-1164

IN THE

Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

ARBAUGH v. Y & H CORP, 546 U.S. 500, 515-516 (2006) 5, 6

BLOCK v. NORTH DAKOTA, 461 U.S. 273, 287 (1983) 6

DAY v. MCDONOUGH, 547 U.S. 198 (2006) 6

EBERHART v. UNITED STATES, 546 U.S. 12, 16 (2005) 5

FINN v. UNITED STATES, 123 U.S. 227 (1887) 3, 4

HENDLER v. UNITED STATES, 952 F.2D 1364, 1377 (FED. CIR. 1991) 8

IRWIN v. DEPARTMENT OF VETERANS AFFAIRS, 498 U.S. 89 (1990) 4

KEENE CORP. v. UNITED STATES, 508 U.S. 200 (1993) 7

KENDALL v. UNITED STATES, 107 U.S. 123 (1883) 3

KENDALL, FINN AND SORIANO v. UNITED STATES, 352 U.S. 270 (1957) 3, 4

KONTRICK v. RYAN, 540 U.S. 443 (2004) 6

LORETTO v. TELEPROMPTER MANHATTAN CATV CORP., 458 U.S. 419 (1982) 8

LORILLARD v. PONS, 434 U.S. 575, 580 (1978) 5

MITCHELL v. MAURER, 293 U.S. 237, 244 (1934) 2

SCARBOROUGH v. PRINCIPI, 541 U.S. 401 (2004) 6

TAHOE-SIERRA PRESERVATION COUNCIL, INC. v. TAHOE REGIONAL PLANNING AGENCY, 535 U.S. 302, 322 n. 17 (2002) 9

WISNIEWSKI v. UNITED STATES, 353 U.S. 901, 902 (1957) 6

STATUTES

28 U.S.C. §1295(a)(3) 7

28 U.S.C. §2107 ..... 4, 5

28 U.S.C. §2501 ..... 1, 2

28 U.S.C. §2510 4

42 U.S.C. §9601 3

62 STAT. 869 5

RULES

FED. RULE APP. PROC. 4(a)(6) 6

FED. RULE CRIM. PROC. 33(a) 6

ARGUMENT

The Government's brief in opposition demonstrates why the important, unsettled and recurring questions presented in the petition warrant this Court's review. The Government attempts to minimize the change in the "jurisdiction" landscape caused by this Court's recent cases that undercut the force of the Court's 19th century statutes of limitation cases. The Government overlooks the importance of the Federal Circuit's intra-circuit conflict, and concedes that the decision below conflicts in principle with decisions from other circuits. The Government ignores the continuing disarray in the Court of Federal Claims over the jurisdictional issue. On the accrual of John R. Sand's permanent physical taking claim, the Government attempts to brush aside the distortion of accrual rules caused by the decision below. Finally, the Government's opposition reframes the question presented to minimize its tactical decision to agree with John R. Sand on the date of accrual of John R. Sand's taking claim.

1. The Government's brief in opposition rephrases the question presented to deflect the important and unsettled nature of the issue decided below. The Government seeks to transform the important jurisdictional issue addressed by the panel majority and dissent into a question of minor error. Opp. I.

The issue presented as framed by the Government – whether a court of appeals may *sua sponte* raise a statute of limitations issue – begs the question presented by John R. Sand. Only if 28 U.S.C. §2501 is jurisdictional would the Federal Circuit be justified in addressing the timeliness of John R. Sand's

complaint where the Government agreed that John R. Sand's complaint was filed timely. Indeed, John R. Sand concedes that a court must always question its subject matter jurisdiction. Pet. 8 n. 2, citing *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). The Government's unexceptional question, however, is not an issue that sharply divided the panel majority and dissent. That issue is whether the statute of limitations in 28 U.S.C. §2501 limits the jurisdiction of the Court of Federal Claims.

2. In its Statement, the Government implies that John R. Sand wrongfully interfered with the remedial work at the landfill. Opp. 3. The Government overlooks, however, that the government contractor determined in 1992 to do away with John R. Sand's property rights, before any EPA fences were erected at the landfill site:

> The continued existence or operation of these facilities [including John R. Sand] in their present locations is inconsistent with the effective management of this Site.
>
> The lease with the John R. Sand and Gravel Company (if still in existence) should be terminated to ensure that this operation does not interfere with future activities associated with the RD/RA [remedial design/remedial action].

Jt. Ex. 8, C.A. App. 3191. In addition, in relation to John R. Sand's mining operations relative to the landfill (Opp. 2-3), John R. Sand was never named a potentially responsible party concerning the landfill under the Comprehensive Environmental Response,

Compensation and Liability Act, 42 U.S.C. §9601 *et seq.*, or any other relevant environmental laws. C.A. App. 1731.

3. The Government's opposition overlooks dicta from this Court's 19th century decisions that form the basis of the Federal Circuit's limitations-as-jurisdictional holdings. The Government's opposition also fails to recognize the placement of §2501 in the procedural chapter of the Judicial Code concerning the Court of Federal Claims.

a. The Government argues that the Court has consistently treated §2501 as jurisdictional, citing *Kendall v. United States*, 107 U.S. 123 (1883), and *Finn v. United States*, 123 U.S. 227 (1887) (Opp. 8-10), as did the panel majority of the Federal Circuit. Pet. App. 18a-19a. The jurisdictional edifice constructed by the Federal Circuit is built upon *Kendall*, *Finn* and *Soriano v. United States*, 352 U.S. 270 (1957). See Pet. 11-13. But this edifice is grounded on dicta in those cases.

Kendall held that the Court could not engraft a disability, not mentioned in the predecessor to §2501, onto the statute to extend the six-year limitations period. 107 U.S. at 125. *Kendall* did not decide, however, whether the statute's six-year limitation was a clear congressional statement limiting the subject matter jurisdiction of the Court of Federal Claims.

Finn acknowledged that the plaintiff's claim for the value of horses and mules he provided the Government during the Civil War to be "cognizable" by the Court of Claims, 123 U.S. at 231-232, but held that the claim could not be revived by the executive branch on a second application by the plaintiff twelve years after the executive branch first denied the claim. *Id.* at 233. From that second attempt comes the oft-quoted

phrase: "[B]ut the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims." *Id.* That statement dealt with a statutory procedure by which the executive referred claims to the Court of Claims, see now 28 U.S.C. §2510 (referrals by Comptroller General to Court of Federal Claims), rather than whether the predecessor to §2501 is a clear congressional statement limiting the subject matter jurisdiction of the Court of Federal Claims.

Soriano, like *Kendall*, involved whether a disability not included in the statute can toll the statute of limitations in §2501. 352 U.S. at 275. Citing *Kendall*, the Court held that the six-year limitation on plaintiff's claim for compensation for supplies requisitioned by Philippine guerrilla forces during the second world war could not be tolled because war was not a disability mentioned in the statute and could not be implied. *Id.* at 276. Whether *Soriano's* strict non-tolling rule remains good law is doubtful in light of *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990) (see Pet. 12-13, 34a-36a (dissent below)). Nevertheless, *Soriano* did not decide whether §2501 constitutes a clear congressional statement limiting the subject matter jurisdiction of the Court of Federal Claims.

b. The Government argues that the Court should not hold the petition in this case pending its decision in *Bowles v. Russell*, No. 06-5306 (argued March 26, 2007), because *Bowles* involves the different question of whether 28 U.S.C. §2107 establishes a jurisdictional time limit for filing a notice of appeal in a federal civil case. Opp. 15-16. Although *Bowles* deals with appellate jurisdiction of the courts of appeal rather

than subject matter jurisdiction of the Court of Federal Claims, one issue in *Bowles* is relevant here.

A substantial issue at oral argument in *Bowles* was the relevance of the location of 28 U.S.C. §2107 in relation to the appellate jurisdiction of the courts of appeal. Tr. oral arg. at 29-31. In this case, the panel majority overlooked the structure of Title 28 relating to the jurisdiction and procedure of the Court of Federal Claims. Section 2501 does not appear in Chapter 91 of Part IV of Title 28, entitled "Jurisdiction and Venue". Rather, §2501 appears in Chapter 165, entitled "United States Court of Federal Claims Procedure".

The Government argues that Congress has reenacted §2501 without substantial change and therefore a presumption arises that Congress is aware of prior judicial interpretations, citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Opp. 9-10. That argument, however, overlooks the recodification and rearrangement of Title 28 in 1948, 62 Stat. 869, 940-942, 975-976, that clearly separated Court of Federal Claims procedure from Court of Federal Claims jurisdiction. The present structure of Title 28 was not considered by *Kendall*, *Finn* or their progeny, but should be addressed by the Court to "brush away confusion introduced by our earlier opinions", *Eberhart v. United States*, 546 U.S. 12, 16 (2005), about the jurisdictional nature *vel non* of §2501.

4. The Government ignores the common thread of the Court's recent claim-processing cases that, absent a clear statement of congressional intent, statutes of limitation are not jurisdictional. *Arbaugh v. Y & H Corp*, 546 U.S. 500, 515-516 (2006). See Opp. 12. The question here is whether §2501 is such a clear statement of congressional intent. No modern decision of the Court has so held, and the efficacy of the dicta in

the Court's 19th century cases is doubtful upon close reading in light of *Irwin*. More generally, the issue concerns the long-standing rule that statutes of limitation must be strictly construed in favor of the Government because they condition the waiver of sovereign immunity. See *Block v. North Dakota*, 461 U.S. 273, 287 (1983). That rule has allowed lower courts to construe §2501 to be a limit on subject matter jurisdiction, even though the statutory text assumes that subject matter jurisdiction exists.

a. The question presented in this case concerning whether §2501 limits the subject matter jurisdiction of the Court of Federal Claims should rank in importance similar to the questions presented in this Court's recent claim-processing cases: *Kontrick v. Ryan*, 540 U.S. 443 (2004) (bankruptcy rules); *Scarborough v. Principi*, 541 U.S. 401 (2004) (Equal Access to Justice Act fee-processing procedure); *Eberhart*, *supra* (Fed. Rule Crim. Proc. 33(a) concerning motions for new trial); *Arbaugh*, *supra* (definition of "employer" in Civil Rights Act of 1964); *Day v. McDonough*, 547 U.S. 198 (2006) (habeas petition under Antiterrorism and Effective Death Penalty Act of 1996); and *Bowles*, *supra* (motion to reopen appeal time under Fed. Rule App. Proc. 4(a)(6)). The Government's attempt to distinguish these cases (Opp. 12) ignores this Court's efforts to clarify the concept of jurisdiction. The unsettled relationship between the Tucker Act's statute of limitations and subject matter jurisdiction warrants similar clarity from this Court.

b. The Government asserts that the intra-circuit conflict concerning the jurisdictional nature of §2501 that has divided the Federal Circuit for 20 years provides no basis for this Court's review, citing *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

Opp. 13 n.3. See Pet. 15-17. *Wisniewski* is readily distinguishable, because it involved certification by a court of appeals to this Court of a question that should not have invoked the "exceptional" jurisdiction of this Court on certification, see S. Ct. Rule 19, a procedure not involved here.

The Government overlooks the importance of intra-circuit conflict in the Federal Circuit in relation to this Court's review. The Federal Circuit has "exclusive jurisdiction" of appeals from final decisions of the Court of Federal Claims. 28 U.S.C. §1295(a)(3). As to matters that fall within the Federal Circuit's exclusive appellate jurisdiction, no conflict with decisions of the regional courts of appeal can arise. Thus, in the absence of review by this Court, decisions by the Federal Circuit declare the law. For issues solely within the exclusive jurisdiction of the Federal Circuit, there is no opportunity for this Court to await percolation of issues through the regional courts of appeal. In addition, this Court has granted certiorari regarding important questions of Court of Federal Claims' jurisdiction decided by the Federal Circuit in the absence of inter-circuit conflict. *Keene Corp. v. United States*, 508 U.S. 200 (1993) (28 U.S.C. §1500 precludes Court of Federal Claims jurisdiction over claims pending in another court).

Indeed, two aspects of the Federal Circuit's intra-circuit conflict are functional equivalents of inter-circuit conflict. First, the Federal Circuit has wrestled with the jurisdictional nature of §2501 for twenty years. See Pet. 15-17. Second, the panel majority and dissent take squarely conflicting positions on the jurisdictional issue, each citing cases on the two sides of the Federal Circuit's twenty-year debate. A square and

irreconcilable conflict could not be more clear and more clearly in need of prompt review by this Court.

c. The Government conceded that the Federal Circuit's decision conflicts in principle with decisions from other circuits that hold that statutes of limitation for bringing suit against the United States generally are not jurisdictional in the absence of a clear congressional statement. Opp. 13-14. Thus, the Government implicitly acknowledges that the issue of whether §2501 represents a clear congressional statement limiting the subject matter jurisdiction of the Court of Federal Claims is ripe for review by this Court.

5. The Government attempts to minimize the importance of the second question presented, whether a claim for a permanent physical taking of a portion of real property first accrues upon the Government's temporary exclusion of the property holder from another portion of the property. The Government characterizes the question as raising no issue of broad legal importance. Opp. 16-17. The Government asserts that any disagreement over the Federal Circuit's holding is simply a question of whether the Federal Circuit erred in applying "established legal principles". However, the Federal Circuit significantly altered the test of permanent physical occupancy set forth in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991), to allow a permanent physical occupation to occur when the government has a "presence of a permanent nature" anywhere on the property holder's property. Pet. App. 26a. This change is hardly an application of established legal principles.

The Government fails to appreciate the "serious imprecision" (Pet. 39a) that the Federal Circuit's decision now imposes on takings law. This imprecision leaves in doubt the calculation of an accrual date of physical takings cases where such takings are "typically obvious and undisputed." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 n. 17 (2002). This imprecision will allow the government to manipulate the accrual date based upon its "presence" rather than its "permanent occupancy." This imprecision will reverberate through takings cases absent review by this Court.

CONCLUSION

The petition for certiorari should be granted.

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No. 06-1164

IN THE

Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY, PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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TABLE OF CONTENTS

Page

Relevant Docket Entries 1a

Complaint 4a

Answer 21a

Plaintiff's Brief Concerning Accrual Date of the Take (excerpts) 31a

Defendant's Special Briefing in Response to the Court's Order of 7/7/2004 (excerpts) 37a

Stipulated Facts 41a

In the United States Court of Federal Claims:

10/29/2004	1	Complaint
08/21/2002	9	Answer
12/13/2002	16	Motion by United States for judgment on the pleadings
01/23/2003	21	Response by John R. Sand & Gravel Company to motion for judgment on the pleadings
03/13/2003	34	Supplemental brief by John R. Sand & Gravel Company regarding accrual of a physical taking claim
03/13/2003	35	Supplemental briefing by United States regarding motion for judgment on the pleadings
05/14/2003	38	Motion for partial summary judgment by John R. Sand & Gravel Company
06/27/2003	40	Opinion and order denying United Sates' motion for summary judgment that John R. Sand & Gravel Company's complaint is time barred except with respect to monitoring wells not

		abandoned and still in operation, which is granted
12/01/2003	61	Cross motion and opposition to John R. Sand & Gravel Company's motion for partial summary judgment
02/02/2004	84	Opinion denying Metamora Group's motion to intervene
04/02/2004	117	Opinion granting United States' cross motion for summary judgment with respect to *Lucas* background principles applying to physical takings and denying John R. Sand & Gravel Company's motion for summary judgment
04/08/2004	123	Opinion denying United States Rule 14(b) motion
04/13/2004	126	Opinion denying motion to stay proceedings pending appeal filed by General Motors Corporation, et al
07/09/2004	166	Supplemental brief by John R. Sand & Gravel Company regarding accrual date of the take as May 1998

07/09/2004	167	Supplemental brief by United States suggests John R. Sand & Gravel Company's cause of action accrued in May 1998
07/09/2004	170	Stipulated facts
10/29/2004	182	Opinion directing judgment in favor of United States as to all claims of John R. Sand & Gravel Company

United States Court of Appeals for the Federal Circuit:

08/09/2006	Opinion vacating and remanding judgment of the court of federal claims
11/30/2006	Order denying plaintiff's motion for rehearing en banc

02-509L
In the United States Court of Federal Claims

John R. Sand & Gravel Company,
a Michigan corporation,
Plaintiff,

v.

The United States,
Defendant.

Complaint

Plaintiff John R. Sand & Gravel Company, through its counsel, Beier Howlett, P.C., complains against defendant the United States as follows:

Statement of Claim

1. This is an inverse condemnation action seeking compensation for defendant's physical taking of plaintiff's property.

Parties

2. Plaintiff John R. Sand & Gravel Company is s Michigan corporation that operates a sand and gravel mine in Metamora Township, Lapeer County, Michigan.

3. The United States Environmental Protection Agency ("EPA") is an agency of defendant.

Jurisdiction

4. This court has subject matter jurisdiction because plaintiff's claim against defendant is founded upon the Constitution of the United States and is in excess of $10,000.00. 28 U.S.C. § 1491 (a).

Plaintiff's Sand and Gravel Operations

5. Plaintiff entered into a sand and gravel lease in 1969, a copy of which is attached as Exhibit 1, regarding property in Metamora Township, Lapeer County, Michigan (the "Leased Property"), whose legal description is:

> The east 1/2 of the southwest 1/4 and the west 1/2 of the southeast 1/4, except the south 189 feet of the west 380 feet of the east 820 feet of the southwest 1/4 of the southeast 1/4, section 10, Town 6 North, Range 10 East.

The Leased Property contains 158 acres, more or less. The Leased Property's street address is 1717 Dryden Road, Metamora, Michigan.

6. At the time the lease was entered into, Russell Parrish and Mildred Parrish, husband and wife, owned the Leased Property. Russell and Mildred Parrish are both deceased. The Estate of Russell Parrish, deceased, now owns the Leased Property, except for a parcel within the Leased Property which the Parrishes conveyed to County Transfer Station, Inc. in 1989, subject to plaintiff's sand and gravel lease.

7. The term of the lease is for fifty years, beginning on August 1, 1969 and ending on August 1, 2019.

8. The lease grants plaintiff the exclusive use of the Leased Property to remove and sell sand and stone from the Leased Property:

> ...which premises are hereby leased to the exclusive use of the party of the second part for the purpose of stripping the land, taking out and removing therefrom the marketable stone and sand, which is, or which may hereafter be found on, in or under said land, together with the right to construct or build, and to make all excavations, pits openings, ditches, roadways and other improvements upon the said premises, which are or may become necessary or suitable for removing sand and stone from the said premises.

Exhibit 1, Lease ¶1.

9. Plaintiff entered the lease with the reasonable expectation that, during the term of the lease, it could remove and sell sand and stone from the Leased Property. Plaintiff has removed and sold sand and stone from the Leased Property continuously from the inception of the Lease, except for defendant's taking of plaintiff's property.

10. Plaintiff operates its sand and gravel business by digging naturally occurring sand and gravel, conveying the material to a crushing and wash plant, and crushing, sorting and washing the unconsolidated material into different products, such as 2NS sand, 6A stone, pea gravel, mason sand, fill sand and other products.

11. Plaintiff uses a groundwater well to pump water into a supply pond from which plaintiff draws water for its sand and gravel washing operation.

12. Finished products (washed sand and stone, fill sand and other products) are sold to customers and loaded into customers' trucks that come onto the Leased Property.

EPA Activities on the Leased Property

13. The Metamora Landfill is located on the northern portion of the Leased Property. The Metamora Landfill comprises between 20 and 80 acres.

14. The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq.*, authorizes the President of the United States to investigate and respond to sites where there have been releases or threatened releases of hazardous substances.

15. Executive Order 12580 delegates to EPA the President's authority to investigate and respond to such sites.

16. On September 21, 1984, EPA, acting under the authority granted by CERCLA, placed the Metamora Landfill on the National Priorities List of sites of environmental contamination.

17. EPA completed a Site Characterization Report for the Metamora Landfill Site (the "Site") in February 1986. EPA completed a Phased Feasibility Study for the Site in August 1986.

18. On September 1, 1986, the Regional Administrator of the EPA signed a Record of Decision ("ROD"), which contains a remedial action plan for areas 1 and 4 of the Site. Area 1 is generally in the south central portion of the Site. Area 4 is generally in the northwest portion of the Site.

19. In March 1989, EPA completed a Remedial Investigation of the Site, which included taking soil samples and installation of monitoring wells. Some of this soil sampling and well installation occurred in areas of the Leased Property that are not within the Site.

20. EPA completed the Feasibility Study of the Site in March 1990.

21. EPA issued a ROD for the final remedial action for the Site in September 1990.

22. During or about 1992, EPA and its agents mobilized on the Leased Property to remove barrels and contaminated material from the Site.

23. During these removal operations, EPA demanded access to the Leased Property to perform the work.

24. During the winter of 1992-1993, EPA and its agents erected fences in plaintiff's plant area, in which are located plaintiff's equipment storage area, surge (supply) pile, crushing and wash plant, and customer access roads. These fences prevented plaintiff from operating its machinery and equipment and selling finished products to customers. Following protests

from plaintiff, EPA relocated the fences to areas outside plaintiff's plant area.

Consent Decree and Final Remedial Design

25. On March 17, 1993, EPA and a group of defendants (sometimes known as the Metamora Landfill Settling PRP Group or "Settling Defendants") entered into a consent decree in the action entitled *United States of America v. BASF-Inmont Corporation*, No. 91-CV-40320-FL (E.D. Mich. March 17, 1993). Plaintiff is not a party to the consent decree. The consent decree was judicially approved. 819 F. Supp. 1001 (E. D. Mich. 1993).

26. In the consent decree, Settling Defendants agreed to perform the remediation of the Site. Settling Defendants have at all times relevant to this action been acting as EPA's representatives to implement the remedy at the Site.

27. Under authority of EPA, Settling Defendants demanded that plaintiff not mine any portion of the Leased Property within fences constructed by EPA and its representatives without prior notice to and approval of EPA and the Settling Defendants.

28. Settling Defendants believed that the continued existence of plaintiff's sand and gravel operation was inconsistent with the effective management of the Site, and that plaintiff's lease should be terminated.

29. On August 28, 1996, EPA amended the ROD. The amendment provides that contaminated soil excavated from a portion of the Site be consolidated

with other waste material from the Site and redeposited on the Site under a cap to be placed over the landfill area.

Administrative Order

30. On December 18, 1996, the Superfund Division of Region 5 of the EPA issued an Administrative Order ("Order"), No. 97-C-379, to plaintiff and Edward W. Evatz, Jr. A copy of the Order is attached as Exhibit 2. The Order became effective on January 8, 1997, 21 days after its issuance.

31. EPA issued a similar Administrative Order to Russell Parrish as the then owner of the Leased Property.

32. In the Order, EPA asserted that the Settling Defendants required access to the Leased Property to implement the EPA's remedial action plan and required plaintiff to comply with the terms of the Consent Decree. Exhibit 2, Order ¶4.m (pages 5-6).

33. EPA ordered plaintiff to grant EPA and its agents, subcontractors, consultants and representatives entry and access to all portions of the Leased Property for all activities that EPA asserted were necessary to complete actions required under the Consent Decree. Exhibit 2, Order ¶6.a (pages 7-8).

34. The activities for which EPA ordered access on the Leased Property include but are not limited to: (1) construction and/or maintenance of existing or new access roads, including roads in and around plaintiff's operations area; (2) construction of the landfill cap; (3)

construction of a groundwater extraction and treatment system; (4) long term operation, maintenance and monitoring of the remedy; and (5) relocation of the County Transfer Station. Exhibit 2, Order ¶6.a (pages 7-8).

35. The long term operation, maintenance and monitoring of the remedy include the collection of groundwater samples from groundwater monitoring wells that are installed or are to be installed at various locations on the Leased Property outside of the Site.

36. The Order:

a. Requires plaintiff to grant access for as long as EPA deems necessary for completion of the remedial action and any additional work. Exhibit 2, Order ¶6.b (page 8).

b. Forbids plaintiff from interfering with or impeding the selected remedy, including access roads, components of the groundwater treatment system and fencing. Exhibit 2, Order ¶6.d (page 8).

c. Requires plaintiff to manage and control surface water runoff and to manage and control the use of groundwater so as not to interfere with the implementation of the selected remedy. Exhibit 2, Order ¶¶6.e, 6.f (page 8).

d. Prohibits plaintiff from interfering with the area containing the landfill cap (the "Area of Institutional Controls") by excavating, grading, filling, drilling, mining, storage, disposal or other construction or development. Exhibit 2, Order ¶6.g (page 8).

37. Plaintiff, upon threat of severe sanctions contained in the Order, agreed to comply with the Order, subject to limited conditions, including that such compliance did not waive plaintiff's claim that its property had been taken. See letter from Haynes to Felitti dated January 7, 1997, attached as Exhibit 3. EPA thereafter removed Edward Evatz Jr. as a respondent.

38. When EPA issued the Order, plaintiff was mining and removing sand and stone from the Area of Institutional Controls.

39. Pursuant to the Order, EPA and the Settling Defendants immediately began work at the Site and on the Leased Property, including running hundreds of gravel trucks carrying fill for the landfill cap through plaintiff's plant area.

40. Disputes arose among EPA, the Settling Defendants and plaintiff relating to plaintiff's compliance with the Order. In particular, plaintiff objected to EPA and Settling Defendants treating plaintiff's Leased Property as open land.

41. Defendant filed a complaint in the U.S. District Court for the Eastern District of Michigan in October 1997, *United States v. John R. Sand & Gravel Co.*, No. 97-75497, seeking an immediate order in aid of access and up to $25,000 per day in civil penalties from plaintiff.

42. Following discovery and negotiations among the parties, the court entered an order enjoining plaintiff from interfering with entry by EPA, its contractors and

representatives onto the Site or the Leased Property. *U.S. v. John R. Sand & Gravel Co.*, No. 97-75497, Order (E.D. Mich. March 23, 1998). A copy of the order is attached as Exhibit 4.

43. In 1999, plaintiff and defendant agreed to entry of an order of judgment in civil action 97-75497 on terms substantially similar to the March 23, 1998 order, except that the order of judgment moves EPA's access route to the landfill area from the center of the Leased Property to a road to be constructed on the west side of the Leased Property. Order of Judgment (E.D. Mich. August 1, 1999), attached as Exhibit 5. The order of judgment preserves plaintiff's taking claim (see pp. 4-5).

44. A substantial portion of the Area of Institutional Controls, including valuable sand and gravel, was free of and remains free of contamination. Other areas of sand and gravel under the landfill cap now underlie contaminated materials redeposited under the landfill cap by EPA and Settling Defendants.

45. The landfill cap as constructed by EPA and Settling Defendants contains several hundred thousand cubic yards of fill material permanently located on top of such sand and gravel.

46. The landfill cap was designed to cover more of the Leased Property than the landfill occupies. See Final Cap Contours figure, attached as Exhibit 6.

47. Several fences erected by EPA and Settling Defendants, on which are hung signs that say "Hazardous Waste Area, Do Not Enter," divide much

of the Leased Property into areas that have no relation to hazardous waste disposal areas in the Metamora Landfill. See Fencing Activities figure, attached as Exhibit 7.

48. Upon information and belief, EPA and Settling Defendants have abandoned several monitoring wells and other wells on the Leased Property outside the Area of Institutional Controls by pulling the well casings and filling the boreholes with grout, cement, or other substances.

49. County Transfer Station has agreed with the Settling Defendants, in consideration of large sums of money paid by the Settling Defendants, to restrict its activities on portions of its parcel to allow construction of the landfill cap, including restrictions on sand and gravel mining and use of groundwater (contrary to plaintiff's leasehold interest).

Count I
Physical Taking -Permanent Occupation

50. Plaintiff incorporates by reference paragraphs 1 through 49.

51. EPA, its agents, and their subcontractors, consultants, or representatives have permanently occupied portions of the Leased Property in order to implement the remedy at the Metamora Landfill, including but not limited to the following:

a. Constructing a cap, together with several hundred thousand yards of fill and contaminated

material, over the landfill area and over valuable sand and gravel.

b. Occupying and excluding plaintiff from the Area of Institutional Controls.

c. Constructing an access road across the west side of the Leased Property from Dryden Road to the landfill area (see portion of property covered by declaration attached as Exhibit 8).

d. Installing groundwater monitoring wells on the Leased Property outside the Area of Institutional Controls.

e. Upon information and belief, abandoning monitoring wells and other wells on the Leased Property outside the Area of Institutional Controls by leaving grout, cement and other substances in the ground.

52. These actions are and will continue to be a permanent physical occupation by defendant of the Leased Property.

53. Defendant's permanent physical occupation of the Leased Property has prevented and will continue to prevent plaintiff from mining and selling sand, stone and gravel from and reclaiming that portion of the Leased Property occupied by the Area of Institutional Controls, the western access road, and the monitoring wells.

54. The landfill cap, the remaining land in the Area of Institutional Controls not under the landfill cap, the

western access road and the monitoring wells installed to the Leased Property all require lateral support of adjacent land within the Leased Property.

55. Defendant's permanent physical occupation of the Leased Property has prevented and will continue to prevent plaintiff from mining sand and gravel in and reclaiming such adjacent lateral support areas.

56. Defendant's permanent physical occupation of the Leased Property constitutes and will in perpetuity constitute a taking of plaintiff's property for which defendant must pay just compensation to plaintiff, including severance damages for damage to plaintiff's remaining leasehold interest.

57. Defendant has failed to pay any compensation to plaintiff.

Count II,
Physical Taking - Easement

58. Plaintiff incorporates by reference paragraphs 1 through 57.

59. EPA, its agents, and their subcontractors, consultants or representatives have encumbered the Leased Property through the Order and subsequent judicial orders to implement the remedy at the Metamora Landfill, including but not limited to the following:

a. The Order and subsequent judicial orders require plaintiff to allow EPA and its representatives

to construct and maintain roads over the Leased Property, including to and around plaintiff's plant area.

b. The Order and subsequent judicial orders require plaintiff to allow entry to EPA and its representatives to the Leased Property.

c. The Order and subsequent judicial orders forbid plaintiff from interfering with the remedial work on the Leased Property, including removing the perimeter fencing.

d. The Order requires plaintiff to manage and control surface water runoff from plaintiff's operation so as not to interfere with the implementation and integrity of the selected remedy. Exhibit 2, Order ¶6.e (page 8).

e. The Order states that plaintiff's interference with the performance of any remedial activity will constitute a violation of the Order. Exhibit 2, Order ¶6.i (page 9). Subsequent judicial orders threaten plaintiff with civil penalties for non-compliance.

f. The Order requires plaintiff to encumber any conveyance of plaintiff's leasehold interest to ensure continued access across the Leased Property for EPA and its representatives. Exhibit 2, Order ¶6.j (page 9).

60. The provisions of the Order and subsequent judicial orders that compel plaintiff to grant EPA and its representatives access to the Leased Property and prohibit plaintiff from otherwise interfering with the remedy have encumbered plaintiff's rights under the

lease and diminished its ability to use the Leased Property.

61. The Order and subsequent judicial orders have created an easement appurtenant for access by EPA or its representatives onto and over the Leased Property for the permanent benefit of the Area of Institutional Controls taken by defendant.

62. In implementing its easement over the Leased Property, EPA and its representatives have:

a. Installed, sampled and removed monitoring wells and water supply wells.

b. Operated hundreds of gravel trucks on access roads.

c. Hauled over 200,000 yards of fill and placed such fill in the Area of Institutional Controls.

d. Cut into plaintiff's recirculation ponds and drainageways, causing the loss of thousands of gallons of water for use in plaintiff wash plant.

e. Constructed and used a storage pad on the Leased Property.

f. In general, exercised dominion over the Leased Property consistent with an easement appurtenant.

63. The Order and its implementation by EPA and its representatives constitute and will in perpetuity constitute a taking of plaintiff's property for an

easement appurtenant for which defendant must pay just compensation to plaintiff.

64. Defendant has failed to pay any compensation to plaintiff.

Prayer for Relief

Plaintiff John R. Sand & Gravel Company requests that this court enter judgment for plaintiff and against defendant the United States as follows:

A. Declare that there has been a physical taking of the plaintiff's property through permanent physical occupation by defendant;

B. Declare that there has been a physical taking of an easement appurtenant on plaintiff's property;

C. Award plaintiff compensation for its property that has been taken, in an amount of not less than $50,000,000.00, plus compound interest;

D. Award plaintiff its costs, expenses, expert witness fees, and attorney fees; and

E. Award plaintiff such other relief as this court deems proper and just.

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s/
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Dated: May 20, 2002

Case No. 02-509L
Hon. Emily C. Hewitt

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOHN R. SAND & GRAVEL COMPANY,
a Michigan Corporation,
Plaintiff,

The United States,
Defendant.

ANSWER TO COMPLAINT

The Defendant United States, by and through undersigned counsel, in answer to plaintiffs complaint, hereby admits, denies, responds and avers as follows;

First Defense

Defendant responds to the numbered paragraphs of plaintiffs' complaint as follows:

1. This paragraph constitutes Plaintiff's characterization of its action and thus requires no response.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph.

3. Defendant admits the allegations in this paragraph.

4. The allegations of this paragraph are conclusions of law to which no response is required.

5. The allegations of this paragraph are admitted to the extent they are consistent with the lease referenced therein and the court is respectfully referred to that lease which is attached to Plaintiff's complaint as Exhibit 1, and which is the best evidence of its contents.

6. Defendant lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of this paragraph.

7. The allegations of this paragraph are admitted to the extent they are consistent with the lease referenced therein and the court is respectfully referred to that lease which is attached to Plaintiff's complaint as Exhibit 1, and which is the best evidence of its contents.

8. The Defendant admits that the quoted words are found in the lease, and the court is respectfully referred to that lease which is attached to Plaintiff's complaint as Exhibit 1, and which is the best evidence of its content. The remaining allegations of this paragraph are conclusions of law to which no response is required.

9. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph.

11. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph.

12. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph.

13. Defendant admits the allegations in this paragraph.

14. This paragraph contains Plaintiffs' conclusions of law regarding CERCLA, 42 U.S.C. § 9601 *et seq.*, to which no response is required.

15. This paragraph contains Plaintiffs' conclusions of law regarding Executive Order 12580, to which no response is required.

16. Defendant admits the allegations in this paragraph.

17. Defendant admits the allegations in this paragraph.

18. Defendant admits the allegations in this paragraph.

19. Defendant admits the allegations in the first sentence of this paragraph. Regarding the second sentence, Defendant admits that soil sampling and well installation occurred in areas that are outside the Metamora Landfill Site as described in EPA's February 1986 Site Characterization Report.

20. Defendant admits the allegations in this paragraph.

21. Defendant admits the allegations in this paragraph.

22. Defendant admits the allegations in this paragraph.

23. Defendant admits the allegations in this paragraph.

24. Defendant admits the allegations in the first sentence of this paragraph. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the remaining sentences.

25. Defendant admits the allegations to this paragraph.

26. Regarding the first sentence, Defendant admits that the Settling Defendants agreed to perform the remediation of Operable Unit 2. The allegations of the second sentence are conclusions of law to which no response is required; to the extent matters of facts are alleged, they are denied.

27. Defendant lacks information or knowledge sufficient to form a belief as to the truth or falsity of the allegations.

28. Defendant lacks information or knowledge sufficient to form a belief as to the truth or falsity of the

allegation that Settling Defendants had the beliefs described.

29. Defendant admits the allegations in this paragraph.

30. Defendant admits the allegations in this paragraph.

31. Defendant admits the allegations in this paragraph.

32. Defendant admits that the EPA asserted in the Order that Settling Defendants required access to the property, but denies the remaining portions of this paragraph on the basis of the fact that it mischaracterizes ¶4.m of the Order. Defendant avers that the phrase "to comply with the terms of the Consent Decree" in ¶4.m of the Order pertains to Settling Defendants and their need for access, and not to Plaintiffs.

33. Defendant admits the allegations in this paragraph.

34. Defendant admits the allegations in this paragraph.

35. Defendant admits that the long term operation, maintenance and monitoring of the remedy include the collection of samples from groundwater monitoring wells that are installed or are to be installed at various locations on the leased property outside of the Metamora Landfill Site as described in EPA's February 1986 Site Characterization Report.

36. The allegations of this paragraph are admitted to the extent they are consistent with the term of the Order referenced therein and the court is respectfully referred to that lease which is attached to Plaintiff's complaint as Exhibit 2, and which is the best evidence of its contents.

37. Defendant admits the allegations in the last sentence of this paragraph. Defendant admits that the Plaintiff sent a letter dated January 7, 1997, which stated that he "intends to comply with all the terms of the order," subject to certain conditions. The court is respectfully referred to that letter which is attached to Plaintiff's complaint as Exhibit 3, and which is the best evidence of its contents.

38. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph.

39. In response to the allegations of this paragraph, Defendant admits that remediation work pursuant to the administrative order began in 1988.

40. In response to the allegations of this paragraph, Defendant admits that disputes arose regarding Plaintiff's compliance with the Order but is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the second sentence of this paragraph.

41. Defendant admits the allegations in this paragraph.

42. Defendant admits the allegations in this paragraph and further avers that the order entered by the Court reflects the terms agreed to by Plaintiff as a result of the negotiations referred to by Plaintiff in this paragraph.

43. Defendant admits the allegations in the first two sentences of this paragraph. The allegations of the third sentence of this paragraph are conclusions of law to which no response is required.

44. In response to the allegations of the first sentence of this paragraph, Defendant admits that a portion of the Area of Institutional Controls was free of, and remains free of, contamination. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the second sentence.

45. Defendant admits the allegations in this paragraph.

46. Defendant admits the allegations in this paragraph.

47. Defendant denies the allegations in this paragraph.

48. Defendant admits the allegations in this paragraph.

49. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

50. Defendant incorporates by reference its answers to paragraphs l to 49.

51. The allegations of this paragraph are conclusions of law to which no response is required. Defendant avers that it has properly and safely closed wells no longer needed.

52. The allegations of this paragraph are conclusions of law to which no response is required.

53. The allegation of this paragraph are conclusions of law to which no response is required.

54. Defendant admits that the Area of Institutional Controls, as defined by Plaintiff in paragraph 36(d) of the complaint, and the active monitoring wells that have not been closed require some degree of lateral support of adjacent land. Defendant denies that the western access road and the inactive wells which have been closed require lateral support of adjacent land.

55. The allegations of this paragraph are conclusions of law to which no response is required; to the extent matters of facts are alleged, they are denied.

56. The allegations of this paragraph are conclusions of law to which no response is required.

57. In response to the allegations of this paragraph, Defendant admits it has paid no compensation to plaintiff.

58. Defendant incorporates by reference its answers to paragraphs 1 to 57.

59. The allegations of this paragraph are conclusion of law to which no response is required; matters of fact alleged are admitted to the extent they are consistent with the Order cited therein and the court is respectfully referred to that Order which is attached to Plaintiff's complaint as Exhibit 2, and which is the best evidence of its contents.

60. The allegations of this paragraph are conclusions of law to which no response is required.

61. The allegations of this paragraph are conclusions of law to which no response is required.

62. The allegations of this paragraph are conclusions of law to which no response is required.

63. The allegations of this paragraph are conclusions of law to which no response is required.

64. In response to the allegations of this paragraph, Defendant admits it has paid no compensation to Plaintiff.

All allegations of the complaint which have not been specifically admitted or otherwise answered are hereby denied.

Second Defense - Statute of Limitations

The complaint fails to state a claim upon which relief can be granted.

Third Defense- Statute of Limitations

The right of action alleged in the complaint did not accrue within six years before the commencement of this action, and is accordingly barred under the provisions of 28 U.S.C. § 2501.

WHEREFORE, defendant respectfully requests that this court enter an order:

1. Dismissing the complaint with prejudice;

2. Assessing the costs of this litigation against plaintiffs; and

3. Granting such other relief as the court may deem just and proper.

Respectfully Submitted

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s/
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August 21, 2002

In the United States Court of Federal Claims
No. 02-509 L
Judge Emily C. Hewitt

John R. Sand & Gravel Company,
a Michigan corporation,
Plaintiff,

v.

The United States,
Defendant,

Plaintiff's Brief Concerning:

1. Government employee or agent called as a fact witness may not testify by expert opinion

2. Accrual date of the take is May 1998

***

II. The proper date for the take is May 1998 when the fence erected around the Area of Institutional Controls completely and permanently excluded John R. Sand from mining within the area.

The determination of whether the extent of a government's occupation constitutes a permanent taking is based on the character and duration of the occupation. *Hornback v. United States*, 52 Fed.Cl. 374, 377 (2000). A physical taking is measured in the permanent destruction of the owner's right to possess, use and dispose of its property, while the duration of the government's physical presence is merely a measure of damages. See *Loretto v. Teleprompter*

Manhattan CATV Corp., 459 U.S. 419 (1982), and *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002). Only when the government's presence on a piece of property permanently destroys the owner's right to exclude others from its property has a taking of that property has [sic] occurred.

In *Hendler v. United States*, 952 F. 2d 1364 (Fed. Cir. 1991), a case similar to the present action, the Federal Circuit applied the *Loretto* permanent taking test to a CERCLA remediation matter. As part of the EPA's remedial action plan, the agency determined that a series of monitoring wells was required to monitor the contamination levels of the groundwater caused by the nearby Stringfellow Acid Pits Superfund site. *Id.* at 1367. When the EPA requested Hendler's permission to install wells on his property, he refused. The EPA then exercised its CERCLA authority and entered the property and drilled the wells without his approval. *Id.* at 1369.

Reversing the Court of Federal Claims' dismissal, the Federal Circuit directed that summary judgment be granted to Hendler on the takings claim. The key holding of the court was its rejection of the EPA's argument that since it did not completely exclude Hendler from his property its activities did not interfere with his use of his property. *Id.* at 1375-78. Relying on the *Loretto* holding that a taking occurs when a physical intrusion reaches the extreme form of a permanent physical occupation, the Federal Circuit explained that there was nothing temporary about the wells as installed, nor anything in the EPA's action or orders to suggest that they were a momentary excursion to be withdrawn (and therefore little more

than a trespass), and dismissed the EPA's claim that the intrusions were only temporary. The court found that the agency had behaved as if it had acquired an easement over the property, and therefore the occupation gave rise to a *per se* taking under the *Loretto* analysis:

> The Government does not have the right to declare itself a cotenant-in-possession with a property owner. Among a citizen's--including a property owner's--most cherished rights is the right to be let alone.

Id. at 1374. As a result, the Federal Circuit found the character of the EPA's conduct was a permanent destruction of that right, and therefore constituted a permanent taking of an easement. *Id.* at 1378.

In *McKay v. United States*, 199 F.3d 1376 (Fed. Cir. 1999), the Federal Circuit relied on *Hendler* when it found that the government's placement of monitoring wells onto private property to monitor contamination caused by the adjoining Department of Energy Rocky Flats Environmental Technology Site amounted to a taking. The court stated that:

> a physical occupation of private property by the Government which is adjudged to be of a permanent nature is a taking, and that is true without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.

Id. at 1381, quoting *Hendler*, 952 F.2d at 1377. The court in *McKay* found that because the monitoring

wells intruded into the plaintiff's mineral estate, and since they were not temporary in nature and had remained in place for several years, there was clear evidence of a physical occupation by the government. *Id.*

As shown in *Scogin v. United States*, 33 Fed.Cl. 285, 291-92 (1995) (citing *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 801 (Fed. Cir. 1993)), issuance of an access ordered by EPA does not by itself does not [sic] constitute permanent physical occupation. The execution of an administrative or court order, although purporting to authorize the physical occupation of private property, does not by itself constitute the taking of a compensable property right. *Scogin, supra*, at 291, citing *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 801 (Fed. Cir.1993); *Hendler*, 952 F.2d at 1375.

As this Court found in its order denying defendant's motion for summary judgment, *John R. Sand & Gravel Co. v. U.S.*, 57 Fed. Cl. 182,187-188 (2003):

> ...'a statute that regulates activities on land, such as CERCLA, may effect a *per se* taking where the regulation necessitates a permanent physical occupation of the subject property.' *Scogin v. United States*, 33 Fed.Cl. 285, 290 (1995). However, 'the execution of an administrative or court order, although purporting to allow physical occupation of private property, does not by itself constitute a taking of a compensable property right.' *Id.* at 291 (citing *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 801 (Fed. Cir. 1993); *Hendler v. United States*, 952 F.2d 1364, 1375 (Fed. Cir. 1991)).

> Instead, the focus must be on the actual character of the government action that allegedly physically interfered with the plaintiff's property rights. See Pl.'s Suppl. Br. at 12 (citing *Loretto*, 458 U.S. at 426, 102 S.Ct. 3164). If the government action, in addition to the order, has effectively extinguished the plaintiff's right to possess, use, and dispose of its property interest, then a permanent physical taking has occurred. *Loretto*, 458 U.S. at 435, 102 S.Ct. 3164.

It is when the government actually permanently occupies a person's property that the taking occurs. The EPA's physical occupation in this case, for purposes of the accrual of John R. Sand's physical taking claim, did not commence when the administrative access order became effective in January 1997. The physical occupation occurred when John R. Sand was permanently excluded from the Area of Institutional Controls portion of its leasehold. This event occurred in May 1998 when government agents installed a fence around the Area of Institutional Controls. This fence was installed shortly after the entry of the March 23, 1998 order settling the access lawsuit between the parties. The EPA's permanent physical occupation in 1998 was further confirmed by importation of [ap]proximately 200,000 yards of fill dirt in the landfill area that commenced in 1998 and concluded in 2000.

It was not until the 1998 fence was erected that John R. Sand was physically excluded from the area for mining purposes and its interest in the sand and gravel within the Area of Institutional Controls was permanently destroyed. At this point the EPA in effect declared

itself to be the owner, or at least a co-tenant-in-possession, of the property, ousting John R. Sand from the area and destroying its rights to mine the sand and gravel. John R. Sand could no longer control or make use of the sand and gravel within the area, and more importantly, could not prevent the EPA from occupying the property. John R. Sand lost its right to be left alone. See *Hendler*, 952 F. 2d 1374. The loss of the ability to control this portion of its leasehold constituted the physical taking of John R. Sand's mineral rights for which the government must now provide compensation. Thus, the defendant's permanent physical occupation did not occur as of the effective date of the access order in January 1997, but upon the construction of the perimeter fence enclosing the Area of Institutional Controls in May 1998.

BEIER HOWLETT, P.C.

s/
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Dated: July 8, 2004

In the United States Court of Federal Claims
No. 02-509 L
Judge Emily C. Hewitt

John R. Sand & Gravel Company,
a Michigan corporation,
Plaintiff,

v.

The United States,
Defendant.

DEFENDANT'S SPECIAL BRIEFING IN RESPONSE TO THE COURT'S ORDER OF JULY 7, 2004

Defendant hereby submits its briefing in response to the Court's order of July 7, 2004.

I. THE CURRENT STATE OF THE EVIDENCE SUGGEST PLAINTIFF'S CAUSE OF ACTION ACCRUED IN MAY, 1998.

Previously, the court determined that, for purposes of the parties' cross-motions for summary judgment, the Court would treat January 8, 1997, as the date of accrual of plaintiff's takings claim. *John R. Sand & Gravel Company v. United States*, 60 Fed. Cl. 230, 241 (Fed. Cl. 2004). It was on this date that EPA's Administrative Access Order, JX 45, took effect. The Court notes in its opinion that the order "prohibited plaintiff from 'engaging in any excavating, grading, filling, drilling, mining, storage, disposal or other construction or development' is the [AIC]" *John R.*

Sand & Gravel, 60 Fed. Cl, at 241, quoting from the Administrative Access Order at ¶6(g). Defendant submits that a January, 1997 date of taking does not appear to be fully supported by the evidence.

First, the Administrative Order, JX 45, did not explicitly bar plaintiff from the AIC.

Indeed, at that time, the AIC had not been established. Instead the order focused on the question of plaintiff's "interference" with EPA's access to the entire 154 acres. An examination of the full text of ¶6(g) is helpful. It provides:

> In the area covered by the landfill cap, as depicted in Figure 2, Respondents *shall not interfere with the implementation and integrity of the selected remedy* by, but not limited to, engaging in any excavating, grading, filling, drilling, mining, storage, disposal or other construction or development.

JX45 at 8 (emphasis added). Briefly stated, ¶6(g) prohibited plaintiff from *interfering* with the remedy by mining or by other specified activities, but this language appears not to prohibit John R. Sand from mining in a manner that does not interfere. Second, ¶6(g) applies to "the area covered by the landfill cap," yet at the time, no cap bad been constructed. This provision is thus somewhat unclear. Moreover plaintiff's claim in this case was for a physical taking, not a regulatory taking. The Administrative Access Order had no physical impact.

More significantly for purposes of an analysis of when plaintiff's cause of action accrued, plaintiff did not obey the Administrative Order. Instead, plaintiff continued to block EPA and its agents from entering the property, engaging in numerous acts of interference over the subsequent years. *See* Defendant's June 15, 2004 *Memorandum of Contentions of Law and Fact* at 12-13.

Because plaintiff's acts of interference eventually forced work on the environmental remediation of the Site to stop, in early 1997 the United States eventually filed a complaint in United States District Court, seeking an injunction against plaintiff. On March 23, 1998, the District Court entered an order enjoining plaintiff "from interfering" with EPA or preventing them "from entering on or at the Metamora Landfill Site." But similar to the previous administrative order, that order did not specifically bar plaintiff from the AIC.

Because of plaintiff's acts of resistance to the efforts of EPA to keep him outside the fencing that existed at the Site from 1992 forward, based on the current state of the evidence it appears that it was not until May 1998 when the fence was re-aligned to enclose only the 39-acre area immediately around the landfill portion of the Site that plaintiff was clearly and permanently excluded from the AIC. DX 248.

Dated: July 8, 2004

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02-509L
In the United States Court of Federal Claims

John R. Sand & Gravel Company,
a Michigan corporation,
Plaintiff,

v.

The United States,
Defendant.

Stipulated Facts

1. Plaintiff leased the property described in the lease for mining purposes on August 1, 1969 for a term of 50 years in accordance with the terms of the lease (JX1).

2. Plaintiff's lessor, Russell Parrish, is deceased. The Estate of Russell Parrish now owns the property.

3. What is known as the Metamora Landfill Superfund site is located on the northern portion of the plaintiff's leasehold.

4. Drum Area 1 is located in the south central portion of the site; Drum Area 4 is located in the northwest portion of the site.

5. Michigan placed the Metamora Landfill on its Act 307 list for contaminated sites.

6. In 1984 EPA placed the Metamora Landfill site on its National Priority List of Hazardous Waste Sites.

7. The investigation and remediation of the Metamora Landfill site was initially State-led by the MDNR. The State contracted with E.C. Jordan to conduct various investigations and studies from 1986 to 1990 to evaluate the contamination at the site and to recommend potential remedies. The State later contracted with Chemical Waste Management, which removed, transported, and disposed of drums from Drum Area 1 and Drum Area. 4. The State did not complete the removal and disposal of all of the drums from Drum Areas 1 and 4.

8. EPA issued a Record of Decision for the Metamora Landfill in September 1986 (JX2).

9. EPA issued a second ROD in September 1990 concerning the remediation of the site (JX5).

10. The 1990 ROD called for a cap over the landfill, a pump and treat system for contaminated groundwater, and deed restrictions.

11. The Metamora Landfill Settling PRP Group (MLSPG) entered into a consent decree with EPA in 1993 (JX10).

12. The consent decree was judicially approved. *United States v BASF-Inmont Corp.*, 819 F. Supp. 601 (E.D. Mich 1993).

13. Plaintiff is not a party to the consent decree.

14. EPA, with the State of Michigan's concurrence, amended the 1986 ROD in August 1996 (JX16).

15. The MLSPG relocated approximately 40,660 cubic yards of soil from Drum Area 1 and a soil staging area to the south face of the landfill, which was later covered by the landfill cap.

16. The landfill cap system remedy consists of (a) a cap extending to approximately the edge of the waste, (b) a gradual slope from the top of the cap to permit surface water to run down and away from the landfill mass and to prevent erosion, (c) stormwater ditches and retention pond, (d) access roads, (e) site-security fence to control access, (f) installation, monitoring, and maintenance of a landfill gas venting system, and (g) implementation of access/deed restrictions. This remedy was approved by the EPA and the MDEQ.

17. On December 18, 1996, EPA issued to plaintiff an administrative order directing compliance with a request for access to implement the remedy (JX45).

18. On December 18, 1996, EPA designated the MLSPG as EPA's representatives for the purpose of entry on, and access to, the property to implement the remedy (JX18).

19. EPA, with the State of Michigan's concurrence, amended the ROD on September 27, 2001, which provided for, among other things, a Monitored Natural Attenuation remedy for the contaminated groundwater (DX224).

20. In May 1998 the fence was realigned to create an Area of Institutional Controls. This fence completely excluded plaintiff from the Area of Institutional Controls.

21. In November and December 2003, the MLSPG relocated portions of the 1998 fence around the Area of Institutional Controls to reduce the size of the Area of Institutional Controls (JX 41, 42).

22. The remedy at the Metamora Landfill is designed to exist for a minimum of 30 years.

23. Metamora Township enacted its Soil Removal Ordinance No. 34 on May 22, 1996 (JX 15).

24. Plaintiff entered into a consent judgment with Metamora Township dated July 13, 1999 (JX 28).

25. Metamora Township issued a soil removal permit to plaintiff on June 6, 2003 to mine a portion of the property (JX39).

Respectfully submitted,

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(6)

No. 06-1164

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IN THE

Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY, PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The statute of limitations codified in 28 U.S.C. § 2501 provides: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The question presented is:

Whether the statute of limitations in 28 U.S.C. § 2501 limits the subject matter jurisdiction of the Court of Federal Claims.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent company. No publicly held company owns 10% or more of petitioner's stock.

TABLE OF CONTENTS

Question Presented i

Rule 29.6 Corporate Disclosure Statement ii

Table of Authorities viii

Opinions Below 1

Jurisdiction 1

Constitutional Provisions and Statutes Involved 1

Statement of the Case 2

1. Statement of Facts 2

   a. John R. Sand's Leasehold 2

   b. EPA's Early Activities 3

   c. Early EPA Fences 3

   d. Amended ROD and Administrative Order 4

2. Proceedings in the Court of Federal Claims: Motion for Judgment on the Pleadings 5

3. Proceedings in the Court of Federal Claims: Trial 6

4. Proceedings in the Federal Circuit 8

Summary of Argument 10

Argument 13

Section 2501 of Title 28 is an unexceptional procedural statute of limitations that does not limit the subject matter jurisdiction of the Court of Federal Claims.

A. By its plain language, § 2501 bars a claim filed more than six years after accrual, when the claim already is one to which subject matter jurisdiction in the Court of Federal Claims has attached. 13

1. Section 2501 assumes, and therefore does not limit, subject matter jurisdiction. 13

2. The timeliness inquiry under § 2501 is separate from the antecedent jurisdictional inquiry under 28 U.S.C. § 1491 15

3. When Congress has conditioned the jurisdiction of the Court of Federal Claims on the timing of a claim, it has done so directly and within the statute granting subject matter jurisdiction 17

B. As codified in Title 28 of the United States Code, statutes granting subject matter jurisdiction to the Court of Federal Claims speak forthrightly in the language of "jurisdiction," while statutes classified as procedural (including § 2501) address jurisdiction only to confirm the prior attachment of jurisdiction. 19

1. Crucial differences in statutory language are highlighted by a comparison of those statutes classified as conferring jurisdiction on the Court of Federal Claims as contrasted with those categorized as establishing procedural rules for the court. 19

2. Statutes defining the subject matter jurisdiction of the Court of Federal Claims speak expressly and distinctively in the language of jurisdiction. 21

3. Section 2501, as the general statute of limitations for the claims within the subject matter jurisdiction of the Court of Federal Claims, is a procedural provision that does not speak in jurisdictional terms. 22

C. The legal context of the historical period and the legislative history of its predecessor confirm that § 2501 is not jurisdictional but rather is an ordinary statute of limitations to be applied consistent with traditional understandings. 24

1. The Tucker Act grants subject matter jurisdiction to the Court of Federal Claims to hear claims over which Congress has waived sovereign immunity. 24

2. The legislative history of the predecessor to § 2501 demonstrates that Congress intended the statute of limitations to be procedural, not jurisdictional 26

3. Construing § 2501's predecessor as non-jurisdictional is consistent with contemporary legal context. 28

4. Early decisions characterizing the predecessor statute of limitations as jurisdictional constitute dicta, contradict the legislative intent, and have been superseded by recent decisions recognizing § 2501 as an unexceptional statute of limitations to be interpreted consistent with practice among private parties. 30

D. This Court does not characterize statutes of limitations on civil claims against the United States as jurisdictional but instead directs them to be applied in the same manner as among private parties. 33

1. This Court's decisions approving equitable adjustments to statutes of limitations applicable in federal government cases negate any

characterizatio of these statutes of limitations as jurisdictional. 33

2. Once Congress has waived sovereign immunity, a statute of limitations should be applied to the government in the same manner as to private parties. 37

3. *Bowles v. Russell* does not apply to statutes of limitations, does not override the traditional rule that a statute of limitations is a non-jurisdictional affirmative defense, and does not contradict *Irwin* or *Franconia*. 38

4. The canon that waivers of sovereign immunity are construed in favor of the sovereign does not permit reformulation of § 2501 from a procedural to a jurisdictional statute. 40

E. Construing § 2501 as non-jurisdictional serves to reduce judicial burdens and promotes efficient litigation. 44

F. The court of appeals dismissal may not be affirmed as an exercise of discretion to raise *sua sponte* the timeliness of a lawsuit when that court squarely decided the issue as a matter of jurisdiction and the government deliberately waived the statute of limitations defense. 47

Conclusion 48

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Cases

Barnhart v. Peabody Coal Co.
537 U.S. 149 (2003) 24

Basso v. United States
239 U.S. 602 (1916) 41

Block v. North Dakota
461 U.S. 273 (1983) 18, 42

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476 U.S. 467 (1986) 35, 36

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551 U.S. ___, No. 06-5306 (June 14, 2007) ..... *passim*

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325 U.S. 304 (1945) 45

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547 U.S. 198 (2006) 38, 39, 47

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123 U.S. 227 (1887) 31, 32

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536 U.S. 129 (2002) ..... *passim*

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503 U.S. 60 (1992) 28

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69 Fed. Cl. 341 (2005) 14

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459 U.S. 56 (1982) 39

Hair v. United States
350 F.3d 1253 (Fed. Cir. 2003) 43

Henderson v. United States
517 U.S. 654 (1996) 23, 29

Honda v. Clark
386 U.S. 484 (1967) 42

Indian Towing Co. v. United States
350 U.S. 61 (1955) 40

Irwin v. Department of Veterans Affairs
498 U.S. 89 (1990) ..... *passim*

Jacobs v. United States
290 U.S. 13 (1933) 43

Jentoft v. United States
450 F.3d 1342 (Fed. Cir. 2006) 41

John R. Sand & Gravel Co. v. Brunswick Corp.
143 Fed. Appx. 317 (Fed. Cir. 2005) 9

John R. Sand & Gravel Co. v. United States
57 Fed. Cl. 182 (2003) 1, 2

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59 Fed. Cl. 645 (2004) 8

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60 Fed. Cl. 347 (2004) 8

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62 Fed. Cl. 556 (2004) 1, 2

John R. Sand & Gravel Co. v. United States
457 F.3d 1345 (2006) 1

Kendall v. United States
107 U.S. 123 (1883) 30, 31, 34, 42

Kontrick v. Ryan
540 U.S. 443 (2004) 9, 12

Lane v. Pena
518 U.S. 187 (1996) 41

Larson v. Domestic & Foreign Commerce Corp.
337 U.S. 682 (1949) 11, 15

Library of Congress v. Shaw
478 U.S. 310 (1986) 38

Loretto v. Teleprompter Manhattan CATV Corp.
458 U.S. 419 (1982) 6

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505 U.S. 1003 (1992) 7

M'Elmoyle v. Cohen
38 U.S. (13 Pet.) 312 (1839) 29

Order of Railroad Telegraphers v. Railway Express Agency, Inc.
321 U.S. 342 (1944) 45

Oropallo v. United States
994 F.2d 25 (1st Cir. 1993) 34

Pierce v. Underwood
487 U.S. 552 (1988) 14

Raygor v. Regents of the University of Minnesota
534 U.S. 533 (2002) 20

Scarborough v. Principi
541 U.S. 401 (2004) 35, 39

Shaw v. Railroad Co.
101 U.S. 557 (1880) 32

Soriano v. United States
352 U.S. 270 (1957) 30, 33, 34, 42

Sun Oil Co. v. Wortman
486 U.S. 717 (1988) 29

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency
535 U.S. 302 (2002) 7

Things Remembered, Inc. v. Petrarca
516 U.S. 124 (1995) 23

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50 U.S. (9 How.) 407 (1850) 29

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534 U.S. 19 (2001) 14

United States v. Brown
333 U.S. 18 (1948) 42

United States v. Causby
328 U.S. 256 (1946) 16, 42

United States v. Clarke
445 U.S. 253 (1980) 16

United States v. Idaho
508 U.S. 1 (1993) 42

United States v. Kubrick
444 U.S. 111 (1979) 40

United States v. Menasche
348 U.S. 528 (1955) 14

United States v. Mitchell
463 U.S. 206 (1983) 11, 15, 25, 42

United States v. Navajo Nation
537 U.S. 488 (2003) 17

United States v. Nordic Village, Inc.
503 U.S. 30 (1992) 40

United States v. Sherwood
312 U.S. 584 (1941) 40, 41, 42

United States v. United States Fidelity & Guaranty Co.
309 U.S. 506 (1940) 11

United States v. Wardwell
172 U.S. 48 (1898) 31

United States v. White Mountain Apache Tribe
537 U.S. 465 (2003) 15, 17

United States v. Williams
514 U.S. 527 (1995) 43

Wood-Ivey Systems Corp. v. United States
4 F.3d 961 (Fed. Cir. 1993) 34, 36

Zipes v. Trans World Airlines, Inc.
455 U.S. 385 (1982) 22, 36, 38

Constitution

U.S. Const. amend. V 1, 16

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1491 ..... 15, 21

28 U.S.C. § 1491(a)(1) ..... *passim*

28 U.S.C. § 1492 21

28 U.S.C. § 1494 21

28 U.S.C. § 1495 21

28 U.S.C. § 1496 21

28 U.S.C. § 1497 21

28 U.S.C. § 1498 21

28 U.S.C. § 1498(b) 18

28 U.S.C. § 1499 21

28 U.S.C. § 1500 21

28 U.S.C. § 1501 21

28 U.S.C. § 1502 21

28 U.S.C. § 1503 21

28 U.S.C. § 1505 ..... 17, 21

28 U.S.C. § 1507 21

28 U.S.C. § 1508 21

28 U.S.C. § 1509 21

28 U.S.C. § 2072(a) 29

28 U.S.C. § 2107 24

28 U.S.C. § 2412 35

28 U.S.C. § 2501 ..... *passim*

28 U.S.C. § 2502 22

28 U.S.C. § 2502(a) 23

28 U.S.C. § 2503 22

28 U.S.C. § 2506 22

28 U.S.C. § 2507 22

28 U.S.C. § 2510 31

28 U.S.C. § 2510(a) 23

28 U.S.C. § 2515 22

28 U.S.C. § 2517 22

28 U.S.C. § 2519 22

42 U.S.C. § 2000e-16(c) 33

42 U.S.C. § 9601 3

Act of February 24, 1855, ch. 122, 10 Stat. 612 ..... 25, 26

Act of March 3, 1863, ch. 92, 12 Stat. 765 25

Act of March 3, 1863, ch. 92, 12 Stat. 767 26

Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 18

Act of June 25, 1948, ch. 646, 62 Stat. 869 19

Act of June 25, 1948, ch. 646, § 33, 62 Stat. 991 20

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Court Rules

Fed. R. Civ. Proc. 8(c) 16, 29, 37

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Legislative Materials

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OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is reported at 457 F.3d 1345. Pet. App. 1a-40a, 157a. The opinion of the Court of Federal Claims denying in part the government's motion for judgment on the pleadings is reported at 57 Fed. Cl. 182. Pet. App. 127a-154a. The opinion of the Court of Federal Claims following a bench trial is reported at 62 Fed. Cl. 556. Pet. App. 41a-126a.

JURISDICTION

The court of appeals' judgment was entered on August 9, 2006. Petitioner's timely petition for rehearing en banc was denied on November 30, 2006. Pet. App. 155a-156a. This Court granted the petition for writ of certiorari on May 29, 2007. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the Constitution provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

The Tucker Act provides in relevant part:

> "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

Section 2501 of Title 28 of the United States Code reads in relevant part: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501.

STATEMENT OF THE CASE

This case arises out of an inverse condemnation claim by petitioner John R. Sand & Gravel Company ("John R. Sand") for a physical taking arising from construction of a fence by the United States Environmental Protection Agency ("EPA") in 1998 that permanently and completely excluded John R. Sand from approximately 42 acres of its 158-acre sand and gravel leasehold. The Court of Federal Claims found that John R. Sand filed its claim timely on May 20, 2002, but, after a bench trial, found the government not liable for a taking. On appeal, the Court of Appeals for the Federal Circuit did not address the merits of John R. Sand's taking claim, but *sua sponte* held, over a vigorous dissent, that the statute of limitations for the Court of Federal Claims, 28 U.S.C. § 2501, was jurisdictional, and held that John R. Sand's taking claim was barred as untimely.

1. Statement of Facts

The Federal Circuit found to be undisputed the pertinent facts set forth in the Court of Federal Claims' decision on the government's motion for judgment on the pleadings, 57 Fed. Cl. 182 (Pet. App. 127a-155a), and decision after trial, 62 Fed. Cl. 556 (Pet. App. 41a-126a). Pet. App. 2a, 15a.

a. John R. Sand's Leasehold

John R. Sand leased 158 acres in Metamora Township, Lapeer County, Michigan, in 1969 for a term of

50 years. Pet. App. 128a, Pl. Ex. 44, Record 361, 368. The lease entitles John R. Sand to exclusive use of the property for mining and removing marketable stone and sand. Pet. App. 53a, Pl. Ex. 44, ¶1. John R. Sand's sand and gravel production facilities, including buildings, a crushing and wash plant, and a water supply well and pond (the "Plant Area"), are located in the center of its rectangular leasehold. A sand and gravel pit is located southeast of the Plant Area. Pet. App. 152a n. 3. A contaminated landfill known as the Metamora Landfill is located in the northern portion of the leasehold. Pet. App. 128a. John R. Sand's Plant Area is not in the landfill area. See figure attached to the Federal Circuit's decision ("February 1994 Fence Alignment"), Pet. App. 157a, 457 F.2d at 1361.

b. EPA's Early Activities

In 1984, the United States Environmental Protection Agency ("EPA") placed the landfill on its National Priority List of hazardous waste sites pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA"). Pet. App. 128a. In 1986, EPA issued a record of decision ("ROD") setting forth remedial action plans concerning portions of the landfill. Pet. App. 128a. By 1989, EPA had installed monitoring wells in the landfill area. Pet. App. 128a. In 1990, EPA issued a second ROD that called for a cap over the landfill. The 1990 ROD did not describe the metes and bounds of the landfill cap, did not indicate when construction of the cap would begin, and did not exclude John R. Sand from any portion of its leasehold. Pet. App. 129a.

c. Early EPA Fences

EPA erected fences in John R. Sand's Plant Area in 1992-1993 that temporarily prevented John R. Sand from operating its machinery and selling finished products to

customers. Pet. App. 129a. Following John R. Sand's protests, EPA relocated the fences outside the Plant Area and John R. Sand continued its mining and gravel operations. Pet. App. 130a. In February 1994, EPA installed another fence in the Plant Area that temporarily deprived John R. Sand of access to its water well and pond, but EPA removed this fence in the summer of 1994 and John R. Sand continuously used the Plant Area thereafter. Pet. App. 130a.

d. Amended ROD and Administrative Order

On August 28, 1996, EPA amended the 1990 ROD to authorize moving contaminated waste remaining at the landfill under the proposed landfill cap. The 1996 amended ROD did not define the area of the cap or any area to which John R. Sand's access would be barred. Pet. App. 130a.

On December 18, 1996, EPA issued an Administrative Order to John R. Sand that required John R. Sand to provide entry and access to EPA and its representatives to all portions of John R. Sand's leasehold. The Administrative Order asserted that access was necessary to complete remedial actions for the landfill pursuant to a 1993 consent decree between EPA and a group of defendants ("Settling Defendants"). Pet. App. 130a-131a, 153a n. 6. The Administrative Order defined by metes and bounds an "Area of Institutional Controls" containing the landfill cap system. The Area of Institutional Controls is the cross-hatched area shown on Exhibit C to the Administrative Order. Joint Trial Exhibit 45, Record 118, 124; Pet. App 158a. The Area of Institutional Controls includes an area larger than the landfill cap and its boundary was not fenced in 1994. Pet. App. 157a.

Following disputes between John R. Sand and EPA concerning EPA's access to the landfill site, the government filed a complaint in the District Court for the Eastern District of Michigan seeking an order in aid of access. In March 1998, the district court issued an order granting the

government and its representatives access to the landfill site and authorizing relocation of the perimeter fence. Pet. App. 119a n.7, Pet. App. 132a. The fence, completed on May 12, 1998, enclosed about 42 acres of John R. Sand's leasehold and completely excluded John R. Sand from the Area of Institutional Controls. Pet. App. 132a.

2. Proceedings in the Court of Federal Claims: Motion for Judgment on the Pleadings

About four years after EPA constructed the final perimeter fence, on May 20, 2002, John R. Sand filed its complaint for a permanent physical taking of the portion of its leasehold enclosed within the Area of Institutional Controls. Pet. App. 132a; J.A. 4a–20a. The government's answer listed as a defense the statutes of limitations in 28 U.S.C. § 2501, but did not describe the statute of limitations as jurisdictional. J.A. 29a–30a .

The government moved for judgment on the pleadings, arguing that the six-year statute of limitations in 28 U.S.C. § 2501 barred John R. Sand's claim. Pet. App. 132a, 134a. The government argued that EPA's activities since 1992, including temporary occupation, removal of hazardous materials, and installation of monitoring wells and original fencing, were the events that fixed the government's liability. Pet. App. 135a. The Court of Federal Claims noted that it must determine when the government had clearly and permanently physically taken John R. Sand's property to identify the date of accrual of John R. Sand's claim. Pet. App. 136a.

Except as to the monitoring wells, the court found that the government did not demonstrate that John R. Sand's property was "clearly and permanently" taken in 1992 to cause a physical taking. Pet. App. 141a. The court found that the government failed to demonstrate that construction of the 1992-1993 fences destroyed John R. Sand's right to possess, use or dispose of its property in the Area of

Institutional Controls within the rule for a permanent physical taking set forth in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). Pet. App. 142a. The court found that John R. Sand had the right to possess and in fact made extensive and valuable use of the portion of its leasehold that later became the Area of Institutional Controls by mining the area until EPA issued the December 1996 administrative order. Pet. App. 142a. See exhibit 10 to plaintiff's memorandum in opposition to motion for judgment on the pleadings (docket no. 21) (Evatz declaration). As to the monitoring wells, the court found that John R. Sand's claim as to the area occupied by the wells was barred, but the extent of the taking for the individual wells did not "bootstrap" to become a permanent physical taking of the entire Area of Institutional Controls. Pet. App. 143a. The court did not decide exactly when John R. Sand's claim first accrued, whether December 1996 or May 1998. Pet. App. 150a.

3. Proceedings in the Court of Federal Claims: Trial

Before trial, the Court of Federal Claims requested briefs on the date of accrual of John R. Sand's claim. John R. Sand and the government agreed in separate briefs that John R. Sand's claim accrued upon construction of the fence around the Area of Institutional Controls in May 1998. J.A. 31a–36a, 37a–40a. In addition, John R. Sand and the government stipulated before trial that the May 1998 fence "permanently and absolutely excluded" John R. Sand from the Area of Institutional Controls. Stipulated Facts No. 20, J.A. 43a. After trial on liability, the Court of Federal Claims determined, among other things, the accrual date of John R. Sand's claim. Pet. App. 50a-52a. The court found as a matter of law that John R. Sand's taking claim accrued in May 1998 when the government's agents completed the fence around the Area of Institutional Controls. Pet. App. 52a. The court found that the access disputes before that date

prevented the government from "permanently and exclusively occupying" the Area of Institutional Controls. Pet. App. 52a. The court found that the May 1998 fence "permanently and absolutely excluded" John R. Sand from the Area of Institutional Controls, citing the parties' stipulated facts. Pet. App. 52a.

On the merits, the Court of Federal Claims determined that John R. Sand's lease constituted a compensable property interest. Pet. App. 52a-58a. The court held, however, that John R. Sand's physical taking claim was non-compensable under equitable principles of "justice and fairness" set forth in regulatory takings cases, in part because John R. Sand had not prevented the continuation of landfilling activities on its leasehold after its lease began in 1969. Pet. App. 72a-73a. The court further held that a 1995 Michigan statute, enacted 26 years after John R. Sand's valid 1969 lease, operated as a background principle of nuisance law pursuant to *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). Pet. App. 81a. Pursuant to that statute, and observing that no Michigan case supported the result, the court held that the government could abate John R. Sand's continued mining in the Area of Institutional Controls as an anticipatory nuisance by permanent physical occupation of the Area of Institutional Controls. Pet. App. 111a-112a.[1]

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[1] The Court of Federal Claims decision after trial is arguably contrary to *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002) (It is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." (footnote omitted)), and *Lucas*, 505 U.S. at 1029 ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."). The Federal Circuit did not address the trial court's decision on the merits, Pet. App. 28a, and the merits of the takings issues are not part of the question presented here.

4. Proceedings in the Federal Circuit

In a split decision, the Federal Circuit vacated and remanded for dismissal, but did not address the merits. Over a vigorous dissent, the panel majority held 28 U.S.C. § 2501 to be jurisdictional, determined that the government's construction of the temporary 1994 fence caused John R. Sand's permanent physical taking claim to first accrue, and held that John R. Sand's complaint filed in 2002 was time-barred.

The panel majority would not have addressed the accrual of John R. Sand's claim but for the majority's view that the statute of limitations is jurisdictional and must be addressed *sua sponte* by the court. The government did not appeal the rejection by the Court of Federal Claims of the government's argument that the statute of limitations barred John R. Sand's claim. Pet. App. 13a. The government conceded on appeal that John R. Sand's taking claim accrued upon construction of the fence around the Area of Institutional Controls in May 1998, and therefore 28 U.S.C. § 2501 did not bar John R. Sand's claim. Pet. App. 14a. The panel majority addressed the jurisdictional issue at the suggestion of the Metamora Group as amicus curiae.[2] Pet. App. 13a-14a, 31a n. 9.

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[2] After this Tucker Act action was filed, the Settling Defendants in the CERCLA consent decree (sometimes known as the Metamora Landfill Settling PRP Group ("MLSPG") and now known as the Metamora Group) moved to intervene as of right and permissively under Rule 24 of the Rules of the Court of Federal Claims (RCFC). The Court of Federal Claims denied the motion. *John R. Sand & Gravel Co. v. United States*, 59 Fed. Cl. 645 (2004). Before trial, the government moved to issue notice to interested parties pursuant to RCFC Rule 14(b). The Court of Federal Claims denied the motion. *John R. Sand & Gravel Co.*, 60 Fed. Cl. 272 (2004). The Metamora Group moved to stay the trial pending appeal of the denial of their motion to intervene. The Court of Federal Claims denied the motion. *John R. Sand & Gravel Co. v. United States*, 60 Fed. Cl. 347 (2004). The Federal Circuit affirmed denial of

The panel majority recognized that this Court's recent jurisprudence, beginning with *Kontrick v. Ryan*, 540 U.S. 443 (2004), considers statutes of limitations and other "claim-processing" rules as non-jurisdictional. The panel majority, however, distinguished § 2501 from this Court's recent statute of limitations jurisprudence, concluding that § 2501 "creates a jurisdictional condition precedent" for suit in the Court of Federal Claims. Pet. App. 18a-19a.

The panel majority further held that John R. Sand's claim for a permanent physical taking accrued upon construction of the temporary February 1994 fence because "EPA's presence destroyed JRS&G's right to exclude others," Pet. App. 24a, even though the Court of Federal Claims found that the February 1994 fence was removed in the summer of 1994 and John R. Sand continuously used the area afterward. Pet. App. 130a.

The dissent argued that this Court's recent statute of limitations jurisprudence applies to § 2501 and that "it is incorrect to accord unique status to § 2501 and hold that it is a limit on 'jurisdiction.'" Pet. App. 34a-36a. As to the panel majority's "permanence" analysis, the dissent argued that the majority's position "brings serious imprecision to takings law." The dissent argued that John R. Sand's claim for a permanent taking of the Area of Institutional Controls should not have accrued based on construction of fences in a separate area of the leasehold, especially since the fences were later removed, restoring the area to continuous use of John R. Sand. Pet. App. 39a.

The Federal Circuit denied John R. Sand's petition for rehearing *en banc* on November 30, 2006. Pet. App. 155a-156a.

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intervention in an unpublished decision. *John R. Sand & Gravel Co. v. Brunswick Corp.*, 143 Fed. Appx. 317 (Fed. Cir. 2005).

SUMMARY OF ARGUMENT

A statute of limitations characterized by this Court as "unexceptional," *Franconia Associates v. United States*, 536 U.S. 129, 145 (2002), and codified by Congress in 1948 in a procedure chapter of the Judicial Code – separate and distinct in language from the jurisdictional provisions that also waive federal sovereign immunity – should not be treated as "jurisdictional," such that a court is obliged to raise and resolve its application *sua sponte*, even when the government expressly conceded the timeliness of the action and waived the issue on appeal.

The text of 28 U.S.C. § 2501, which *assumes* subject matter jurisdiction, should not simultaneously be read to *limit* subject matter jurisdiction. Section 2501 by its express terms bars an untimely action only when the Court of Federal Claims already has taken jurisdiction of the matter: "Every claim of which the United States Court of Federal Claims *has jurisdiction* shall be barred unless the petition thereon is filed within six years after such claims first accrues" (emphasis added). When jurisdiction does lie in the Court of Federal Claims under a statutory waiver of sovereign immunity, such as the waiver found in the Tucker Act, 28 U.S.C. §1491(a)(1), § 2501 operates only as a non-jurisdictional procedural time constraint to disallow stale claims.

Examining the jurisdictional and procedural statutes applicable to the Court of Federal Claims in their structural context – as classified by Congress in the 1948 codification of Title 28 of the United States Code – confirms that § 2501 does not limit the subject matter jurisdiction of the Court of Federal Claims. The statutes codified in the jurisdictional chapter for the Court of Federal Claims, including § 1491(a)(1), speak in the forthright and distinctive language of "jurisdiction." By contrast, § 2501 and other provisions codified in the procedural chapter for the Court of Federal Claims address jurisdiction, if at all, only to confirm the prior attachment or exercise of jurisdiction by the Court of Federal

Claims. Moreover, both at the time that Congress enacted the predecessor to § 2501 and at the time that Congress revised and codified Title 28, the prevailing rule in American law was that a statute of limitations is a procedural device and an affirmative defense that may be waived or otherwise forfeited.

Recognizing the non-jurisdictional nature of this unexceptional statute of limitations does not weaken the doctrine of federal sovereign immunity, does not expand the scope of any statutory waiver of sovereign immunity, and does not hold the United States responsible for previously unrecognized types of liability or for novel forms of relief. John R. Sand does not quarrel with the general understanding that a cognizable claim against the United States, falling within the scope of an express statutory waiver of sovereign immunity and filed in a tribunal with authority over that class of claims, ordinarily presents a non-waivable question of subject matter jurisdiction. See *United States v. Mitchell*, 463 U.S. 206, 212 (1980) ("the existence of consent [to suit by a waiver of sovereign immunity] is a prerequisite for jurisdiction"); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513-15 (1940) (a judgment entered against the United States by a court lacking authority to adjudicate the claim is void for lack of jurisdiction by reason of sovereign immunity). But see *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 696 (1949) (describing a pre-Tucker Act case implicating the Fifth Amendment taking clause as "a specific application of the constitutional exception to the doctrine of sovereign immunity").

Such genuine jurisdictional requirements are plainly satisfied in this case. The Tucker Act, 28 U.S.C. § 1491(a)(1), clearly and unambiguously waives the sovereign immunity of the United States for claims founded upon the Constitution, including the allegation of a taking by the federal government of private property. The Court of Federal Claims indisputably has jurisdiction under the Tucker Act to

hear John R. Sand's inverse condemnation claim and to grant the monetary relief sought by John R. Sand. See *Franconia*, 536 U.S. at 141 (finding that the requirement of a statutory waiver of sovereign immunity was "satisfied" under the Tucker Act, ruling that the government thus was no longer "cloaked with immunity," and only then examining accrual of the statute of limitations in 28 U.S.C. § 2501).

The suggestion that § 2501 is jurisdictional is impossible to square with this Court's ruling in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 94-96 (1990). *Irwin* superseded earlier decisions that had strictly applied statutes of limitations against the United States as jurisdictional conditions on the waiver of sovereign immunity. Because this "Court has no authority to create equitable exceptions to jurisdictional requirements," *Bowles v. Russell*, 551 U.S. ____, No. 06-5306, slip op. at 9 (U.S., June 14, 2007), this Court's presumptive allowance of equitable tolling of statutes of limitations on claims against the government removes such statutes of limitations from the category of jurisdictional commands. In addition, devising a special jurisdictional rule for statutes of limitations, absent express congressional endorsement, would conflict with this Court's clarifying direction that statutes of limitations applicable to suits against the federal government generally should be construed in conformity with the standards applicable to private disputes. *Franconia*, 536 U.S. at 141-42; *Irwin*, 498 U.S. at 94-96.

In *Kontrick*, 540 U.S. at 456, this Court admonished that "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling with a court's adjudicatory authority." When the government has thrown off the cloak of sovereign immunity by expressly granting jurisdiction to a federal tribunal to hear a class of claims, and when the government deliberately strips away any defense based on the applicable

statute of limitations for those claims, the government should not later be permitted to slip the cover of immunity back over itself by clothing an "unexceptional" statute of limitations with a jurisdictional label.

ARGUMENT

SECTION 2501 OF TITLE 28 IS AN UNEXCEPTIONAL PROCEDURAL STATUTE OF LIMITATIONS THAT DOES NOT LIMIT THE SUBJECT MATTER JURISDICTION OF THE COURT OF FEDERAL CLAIMS.

A. BY ITS PLAIN LANGUAGE, § 2501 BARS A CLAIM FILED MORE THAN SIX YEARS AFTER ACCRUAL, WHEN THE CLAIM ALREADY IS ONE TO WHICH SUBJECT MATTER JURISDICTION IN THE COURT OF FEDERAL CLAIMS HAS ATTACHED.

1. Section 2501 assumes, and therefore does not limit, subject matter jurisdiction.

After the 1948 revision and codification of Title 28 of the United States Code (the structural significance of which is discussed in Part B of this brief), 28 U.S.C. § 2501 now reads, in pertinent part (and with emphasis added):

> Every claim of which the United States Court of Federal Claims *has jurisdiction* shall be barred unless the petition thereon is filed within six years after such claim first accrues.

In plain and unambiguous language, § 2501 bars a claim that has been filed more than six years after the claim accrues, *when* the claim *already* is one that falls within the jurisdiction of the Court of Federal Claims. See *Grass Valley*

Terrace v. United States, 69 Fed. Cl. 341, 347 (2005) (Chief Judge Damich) (referring to this understanding as the "plain English interpretation of the statute"). The meaning "most naturally conveyed by the phrase before us" (see *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)) – "*[e]very claim of which the United States Court of Federal Claims has jurisdiction*" (28 U.S.C. § 2501) (emphasis added) – is that the jurisdictional inquiry has been concluded and jurisdiction has attached. See dissent below ("The text of the statute confirms that the limitations period is applied to claims of which the Court of Federal Claims already 'has jurisdiction.'"). Pet. App. 33a. Then, for those jurisdictionally-sufficient claims, § 2501 operates as a bar "*unless the petition thereon is filed within six years after such claim first accrues.*" 28 U.S.C. § 2501 (emphasis added).

Section 2501 speaks in procedural terms of the potential failure to timely state a claim, rather than in jurisdictional terms about the authority of the Court of Federal Claims. By its plain text, § 2501 does not limit the jurisdictional power of the court, because it assumes that the court's jurisdictional authority over the class of claims has already been confirmed under a jurisdictional statute. Instead, § 2501 imposes an affirmative defense against continuation of the litigation properly filed in the Court of Federal Claims when a claim is untimely filed.

A contrary interpretation would read the words "of which the United States Court of Federal Claims has jurisdiction" out of the statute. A statute should be construed so that every word has some operative effect. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001), quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Giving each word operative effect requires an interpretation that § 2501 does not limit the jurisdiction of the Court of Federal Claims, which jurisdiction the statute assumes by inclusion of the phrase "has jurisdiction."

2. The timeliness inquiry under § 2501 is separate from the antecedent jurisdictional inquiry under 28 U.S.C. § 1491.

For claims filed in the Court of Federal Claims, the jurisdictional inquiry and the accrual of the claim for purposes of the statutes of limitations occur in separate stages and should not be confused:

First, the jurisdiction of the Court of Federal Claims is to be determined by reference to one of the jurisdictional statutory sections. In this case involving an allegation of a taking of private property without just compensation, the jurisdictional section is the Tucker Act, 28 U.S.C. §1491(a)(1). This jurisdictional grant provides in relevant part (with emphasis added):

> The United States Court of Federal Claims *shall have jurisdiction* to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

An unequivocal waiver of sovereign immunity ordinarily is a jurisdictional predicate to any suit against the United States. But see *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 696 (1949) (referring to a Fifth Amendment taking claim as implicating "the constitutional exception to the doctrine of sovereign immunity"). In any event, § 1491(a)(1) provides such an unequivocal waiver. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 468, 472-73 (2003); *United States v. Mitchell*, 463 U.S. at 212.

The Tucker Act waives the sovereign immunity of the federal government for claims "founded" on, inter alia, "the

Constitution." The Fifth Amendment of the United States Constitution states, in pertinent part, that no "private property [shall] be taken for public use, without just compensation." U.S. Const., amend. V. As this Court held more than 60 years ago in *United States v. Causby*, 328 U.S. 256, 267 (1946): "If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine." See also *United States v. Clarke*, 445 U.S. 253, 257 (1980) (recognizing "the self-executing character of the constitutional provision with respect to compensation"). Accordingly, in this case the subject matter jurisdictional prerequisites to suit have been established and are not contestable.

Second, with jurisdiction over the claim for relief having been confirmed, the question of timeliness of the suit is to be determined under the procedural statute of limitations, 28 U.S.C. § 2501. When the government has properly pleaded the statute of limitations as an affirmative defense (see Fed. R. Civ. Proc. 8(c) and Rule 8(c) of the Rules of the Court of Federal Claims), the court must determine the point in time at which the claim accrued and then determine whether the claim was filed within six years of that accrual date. In an appropriate case, the court may consider whether § 2501 should be equitably tolled in exceptional circumstances. See *Irwin*, 498 U.S. at 94-96. These determinations are procedural in nature, designed to spare the defendant and the court from the practical consequences of being required to adjudicate stale claims.

If the government fails to plead the statute of limitations or, as in this case, initially asserts but then stipulates to timeliness and on appeal waives the limitations issue, the court is not obliged to revisit the jurisdictional stage of the litigation and decide whether the jurisdiction that had attached to the claim has now been divested because the claim may be untimely. The jurisdictional authority of the Court of Federal Claims over a claim under the Tucker Act is not impaired by the possibility that the government could

have, but has not, argued that the claim accrued more than six years before the lawsuit was filed.

3. When Congress has conditioned the jurisdiction of the Court of Federal Claims on the timing of a claim, it has done so directly and within the statute granting subject matter jurisdiction.

When Congress does wish to place a temporal restriction on the subject matter jurisdiction of the Court of Federal Claims, it has demonstrated that it well knows how to do so in simple terms and through express jurisdictional language. Section 1505 of Title 28, commonly known as the Indian Tucker Act, provides:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States *accruing after August 13, 1946*, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. § 1505 (emphasis added). With the enactment of the Indian Tucker Act in 1946, Indian claimants were granted access to the Court of Federal Claims in the same manner and under the same general terms as other claimants have through the "regular" Tucker Act. See *United States v. Navajo Nation*, 537 U.S. 488, 502-03 & n.10 (2003); *United States v. White Mountain Apache Tribe*, 537 U.S. at 468, 472. But Congress expressly withheld jurisdictional authority from the court for claims arising earlier than August 13, 1946, instead

assigning those earlier-arising claims to the Indian Claims Commission created under the same statute. Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049. See generally *Cohen's Handbook of Federal Indian Law* § 3.02[6][e], at 152 (Nell Jessup Newton, et al., eds. 2005).

As what may be another example, the statutory subsection in the Court of Federal Claims jurisdictional chapter that waives sovereign immunity for claims against the United States for copyright infringement includes a second paragraph stating, in part, "[e]xcept as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action." 28 U.S.C. § 1498(b). Although this three-year limitations period is not directly attached as a proviso to the paragraph creating an "exclusive action" for infringement by the copyright owner against the United States in the Court of Federal Claims, the inclusion of the statute of limitations in the same subsection might be read to characterize the time limitation as a jurisdictional condition on the waiver of sovereign immunity. See *Block v. North Dakota*, 461 U.S. 273, 287 (1983) ("When waiver legislation contains a statute of limitations, the limitations period constitutes a condition on the waiver of sovereign immunity."); but see *Irwin* (discussed in Part D.1 of this brief).

In notable contrast with the Indian Tucker Act and the copyright infringement statute, Congress has not incorporated time limitations in any of the other jurisdictional grants to the Court of Federal Claims, including the Tucker Act, 28 U.S.C. § 1491(a)(1).

B. AS CODIFIED IN TITLE 28 OF THE UNITED STATES CODE, STATUTES GRANTING SUBJECT MATTER JURISDICTION TO THE COURT OF FEDERAL CLAIMS SPEAK FORTHRIGHTLY IN THE LANGUAGE OF "JURISDICTION," WHILE STATUTES CLASSIFIED AS PROCEDURAL (INCLUDING § 2501) ADDRESS JURISDICTION ONLY TO CONFIRM THE PRIOR ATTACHMENT OF JURISDICTION.

1. Crucial differences in statutory language are highlighted by a comparison of those statutes classified as conferring jurisdiction on the Court of Federal Claims as contrasted with those categorized as establishing procedural rules for the court.

In 1948, Congress enacted the revised and reorganized provisions of the Judicial Code into positive law through the codification of Title 28 of the United States Code. Act of June 25, 1948, ch. 646, 62 Stat. 869. As the chief reviser of Title 28, William W. Barron explained, the revision brought about:

> a consolidation of varied and scattered sections pertaining to similar subject matter, a logical, orderly grouping of related principles. While no change was made for the sake of change, we have made the effort, in the words of Cardozo, "to reckon our gains and losses, strike a balance and start afresh."

William W. Barron, *The Judicial Code*, 8 F.R.D. 439, 446 (1949) (quoting Benjamin N. Cardozo, *The Growth of the Law* 19 (1924)).

In testimony presented during the March 1947 hearings before the House Judiciary Committee on the

proposed revision and codification of Title 28, John F. X. Finn, who had served as special counsel to the committee, stated that he was "proudest of the way this proposed code deals with jurisdiction, venue, removal of causes, full faith and credit, and evidence and procedure." *Revision of Titles 18 and 28 of the United States Code, Hearing Before the House Comm. on the Judiciary*, 80th Cong., 1st Sess. 44 (1947). Mr. Finn explained that while such words as "jurisdiction" and "procedure" may be "but labels to the layman," "[t]o lawyers they are the pitfalls of litigation." *Id.* In describing the work of the Title 28 revisers, Mr. Finn concluded that "[w]ise judges and lawyers have objectively and dispassionately explored these pitfalls and covered them with well-drawn statutes so that postwar justice may be sure-footed, courageous, impartial, and serene." *Id.*

To be sure, no direct inference of legislative intent may be drawn by the mere fact that an individual statute was placed within a certain chapter of Title 28 as codified in 1948, nor may dispositive weight be attached to the specific heading assigned to a statutory chapter. See Act June 25, 1948, ch. 646, § 33, 62 Stat. 991 ("No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, as set out in section 1 of this Act, in which any section is placed, nor by reason of the catchlines used in such title.") Importantly, however, the collection of statutory provisions addressing a particular subject matter within a single chapter of Title 28 facilitates direct comparisons of related and unrelated provisions. See *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 545-546 (2002) ("It is a fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). Such a textually-focused comparison highlights the crucial differences and sharp contrasts in language between those statutory sections that confer jurisdiction on the Court of Federal Claims and

those (including § 2501) that instead establish non-jurisdictional procedural rules.

2. Statutes defining the subject matter jurisdiction of the Court of Federal Claims speak expressly and distinctively in the language of jurisdiction.

In its codification of Title 28, Congress reserved the fourth part for provisions on jurisdiction and venue of the federal courts: "Part IV – Jurisdiction and Venue." Chapter 91 of that part, entitled "United States Court of Federal Claims," contains sixteen sections expressly defining and limiting the subject matter jurisdiction of the Court of Federal Claims. These sections are reprinted in the Appendix to this brief.

Nearly all of the sections in Chapter 91 speak forthrightly in the language of "jurisdiction."[3] Sections 1491, 1494, 1495, 1496, 1497, 1499, 1503, 1505, 1507, and 1508 state that "[t]the United States Court of Federal Claims shall have jurisdiction" over a defined claim or set of claims. Sections 1500, 1501, 1502, and 1509 state that "[t]he United States Court of Federal Claims shall not have jurisdiction" over a defined set of other claims. Thus, when Congress grants or withholds "jurisdiction" from the Court of Federal Claims, it knows how to do so and does so with distinctive jurisdictional language.

Importantly, with the notable exception of 28 U.S.C. § 1498 discussed above, none of these provisions limits

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[3] There are only two exceptions to this pattern of language expressly granting or withholding "jurisdiction." First, the unique provision for congressional reference of claims to the Court of Federal Claims (28 U.S.C. § 1492) does not speak in jurisdictional terms because it does not grant jurisdiction as such. Second, the provision waiving sovereign immunity for claims against the United States alleging infringement of patents and copyrights (§ 1498) confers jurisdiction by creating an exclusive action in the Court of Federal Claims.

jurisdiction to those cases in which a claim has been filed within a specified time period. This textual omission is significant. In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), which held that the timely filing of an employment discrimination charge with the Equal Employment Opportunity Commission was not a jurisdictional prerequisite to suit in federal court, the Court began its analysis by focusing on the text and structure of the statute. The Court observed as important that the provision actually granting the court jurisdiction "contains no reference to the timely-filing requirement" and that the provision setting the time limitations appears as an entirely separate section of the statute. *Id.* at 383-94.

3. Section 2501, as the general statute of limitations for the claims within the subject matter jurisdiction of the Court of Federal Claims, is a procedural provision that does not speak in jurisdictional terms.

Section 2501, as the general statute of limitations for claims before the Court of Federal Claims, is codified in a separate part of Title 28 entitled "Part VI – Particular Proceedings" and in Chapter 165 entitled "United States Court of Federal Claims Procedure." In addition to setting the time for filing suit in 28 U.S.C. § 2501, the sections in this chapter address such procedural, non-jurisdictional matters as aliens' privilege to sue (§ 2502); appearance of parties before the court, presentation of evidence, examination of witnesses, rules of practice and procedure, and holding trials (§ 2503); the qualifications of witnesses (§ 2506); discovery (§ 2507); new trials and stays of judgment (§ 2515); payment of judgments (§ 2517); and the conclusiveness of judgments (§ 2519). These sections are reprinted in the Appendix to this brief.

While, again, the mere fact of placement of these provisions into a chapter labeled as "procedure" does not

permit any conclusive inference of legislative intent, an examination of the specific language of these procedural statutes, particularly when compared to the jurisdictional statutes discussed in Part B.2 of this brief, reveals significant differences that confirm congressional intent for a non-jurisdictional purpose.

None of the provisions in Chapter 165 speaks in the language of "jurisdiction" – except to confirm the court's previous exercise of or the availability of subject matter jurisdiction over the claim to which the court is to apply the procedural rule. See 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims *has jurisdiction* shall be barred unless the petition thereon is filed within six years after such claim first accrues.") (emphasis added); *id.* § 2502(a) ("Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the United States Court of Federal Claims *if the subject matter of the suit is otherwise within such court's jurisdiction.*") (emphasis added); *id.* § 2510(a) ("The Comptroller General may transmit to the United States Court of Federal Claims for trial and adjudication any claim or matter of which the Court of Federal Claims *might take jurisdiction* * * * .") (emphasis added).

Like the other rules codified in Chapter 165, § 2501 should be read as a procedural limitation so that it "fit[s] harmoniously within a set of provisions composing a coherent chapter of the Judicial Procedure part of the United States Code." See *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 136 (1995) (Ginsburg, J., concurring); see also *Henderson v. United States*, 517 U.S. 654, 674 (1996) (Thomas, J., dissenting) (contending that a statutory service requirement was jurisdictional, and saying that "[t]he key to understanding the scheme enacted by Congress" lay in Congress's decision not to place this requirement in a procedural section).

John R. Sand recognizes that "some time limitations," notably the statutory period for filing a notice of appeal in a civil action, "are jurisdictional even though expressed in a separate statutory section from jurisdictional grants." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003); see also *Bowles v. Russell*, No. 06-5306 (U.S., June 14, 2007) (holding that a timely civil appeal under 28 U.S.C. §2107 is a jurisdictional requirement).[4] In this case, however, Congress's considered and repeatedly precise direction in a series of statutory sections that the Court of Federal Claims "shall [or shall not] have jurisdiction" over one or another type of claim plainly identifies those provisions that are jurisdictional in nature. When Congress instead eschewed such distinctive language, and especially when Congress crafted a procedural provision like § 2501 that actually assumes the prior existence of subject matter jurisdiction, reformulation of the provision into a jurisdictional restriction does violence to the language that Congress adopted.

C. THE LEGAL CONTEXT OF THE HISTORICAL PERIOD AND THE LEGISLATIVE HISTORY OF ITS PREDECESSOR CONFIRM THAT § 2501 IS NOT JURISDICTIONAL BUT RATHER IS AN ORDINARY STATUTE OF LIMITATIONS TO BE APPLIED CONSISTENT WITH TRADITIONAL UNDERSTANDINGS.

1. The Tucker Act grants subject matter jurisdiction to the Court of Federal Claims to hear claims over which Congress has waived sovereign immunity.

As the first significant grant of permission by the sovereign United States to its citizens to seek relief against it

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[4] The inapplicability of *Bowles v. Russell* to the context of a statute of limitations is addressed in Part D.3 of this brief.

in the courts, the United States Court of Claims was created by Congress in 1855 and given authority to hear claims against the United States founded upon federal statutes, regulations, and contracts. Act of February 24, 1855, ch. 122, 10 Stat. 612; see generally Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 Vill. L. Rev. 155, 175-76 (1998). The Court of Claims originally had authority only to recommend that Congress pay claims, thereby serving as an advisor to Congress regarding the merits of such claims. William M. Wiecek, *The Origin of the United States Court of Claims*, 20 Admin. L. Rev. 387, 397 (1968). President Lincoln urged Congress to give the "power of making judgments final" to the Court of Claims, arguing that "[i]t is as much the duty of Government to render prompt justice against itself, in favor of its citizens, as it is to administer the same between private individuals." Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862). Congress responded in 1863 by granting the Court of Claims power to make binding and final judgments with appellate review by the Supreme Court. Act of March 3, 1863, ch. 92, 12 Stat. 765.

In 1886, Representative John Randolph Tucker introduced a bill to revise the jurisdiction and procedures of the Court of Claims and to replace the 1855 and 1863 statutes. H.R. 6974, 49th Cong. (1886); see generally *United States v. Mitchell*, 463 U.S. at 213. The Tucker Act, enacted in 1887, confirmed the authority and nationwide jurisdiction of the Court of Claims over money claims (other than in tort) based upon federal statutes, executive regulations, and contract, and expanded the court's authority to include actions based upon the Constitution. Tucker Act, ch. 359, 24 Stat. 505 (1887). This grant of jurisdiction to what today is the Court of Federal Claims, and the attendant waiver of sovereign immunity for money claims, is today codified in 28 U.S.C. § 1491(a)(1). See *United States v. Mitchell*, 463 U.S. at 212-16 (§ 1491 waives sovereign immunity, in addition to

directing a claim to the appropriate forum through its jurisdictional directives). On the history and authority of the Court of Federal Claims and the Tucker Act, see generally Gregory C. Sisk, *Litigation With the Federal Government* ch. 4 (4th ed., 2006).

2. The legislative history of the predecessor to § 2501 demonstrates that Congress intended the statute of limitations to be procedural, not jurisdictional.

When Congress granted the then-Court of Claims authority to enter binding judgments in 1863, a six-year limitations period was first introduced.[5] Act of March 3, 1863, ch. 92, § 10, 12 Stat. 767. In the previous 1855 statute creating the Court of Claims, Congress had not included a statute of limitations in the authorizing legislation. See Act of February 24, 1855, ch. 122, 10 Stat. 612. Thus, when considering whether to grant power to the Court of Claims to enter binding judgments, Congress naturally concluded that a statute of limitations should be added to protect against stale claims. See H.R. Rep. No. 34, 37th Cong., 2d Sess. 3 (1862) ("A man who neglects his business for six years cannot complain of the government for refusing his suit; and there is no doubt that a statute of limitations is even more demanded in justice to the government than it is to private individuals.").

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[5] This earliest statute of limitations applicable to claims before the then-Court of Claims provided in pertinent part:

> [E]very claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues.

Act of March 3, 1863, ch. 92, § 10, 12 Stat. 767.

Once having agreed that a time bar should be adopted, however, the expressed sense of the members of Congress was that such a statute of limitations should be applied in the same manner as for private parties. See Cong. Globe, 37th Cong., 3d Sess. 414 (1863) (Sen. Sherman) ("As this bill proposes to throw open this court to all claimants, I think the same statute of limitations ought to be applied to existing claims as would be applied between private individuals"). The Chair of the Senate Judiciary Committee explained the inclusion of a statute of limitations "because there can be no reason whatever for acts of limitation as between citizen and citizen * * * which does not apply as between Government and citizen." Cong. Globe, 36th Cong., 1st Sess. 984 (1860) (Sen. Bayard).

Congressional debates about the 1863 legislation highlighted the controversial question of jurisdiction, but always in terms of the authority of the Court of Claims to hear certain claims and the nature of the claims for relief against the government that should be cognizable before that tribunal.[6] Members of Congress well-understood the concept

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[6] See, *e.g.*, H.R. Rep. No. 34, 37th Cong., 2d Sess. 3 (1862) (reporting that the bill would give to the Court of Claims "jurisdiction of all claims for which the government would be liable in law or equity were it liable to be sued in courts of justice," with certain exceptions, and that "[j]urisdiction is also given to the court of all set-offs, counter-claims, and claims for damages, whether liquidated or unliquidated on the part of the government against the claimant"); Cong. Globe, 36th Cong., 1st Sess. 983 (1860) (Sen. Bayard, Chair Judiciary Committee) (explaining that the committee bill "enlarges the jurisdiction of the court, so as to give it all jurisdiction over all claims proper against the Government whether founded on contract or on act of Congress; or founded upon legal or equitable obligation, according to the general principles of law"); Cong. Globe, 36th Cong., 1st Sess. 985 (1860) (Sen. Benjamin) (proposing "exclu[sion] from the jurisdiction of the Court of Claims those claims which are purely political in their character"); Cong. Globe, 37th Cong., 2d Sess. app. 124 (1862) (Rep. Porter) (stating that proposed bill "enlarges the jurisdiction of the court, by extending it to all claims for which the Government would be liable in law or equity if it were suable in courts of justice"); Cong. Globe, 37th Cong., 3d Sess. 304 (1863) (Sen.

of jurisdiction and used the term in its ordinary sense of judicial power over a class of claims. By contrast, no participant in the legislative process ascribed jurisdictional status to the statute of limitations that would apply to those claims that fell within the jurisdictional authority of the Court of Claims.

3. Construing § 2501's predecessor as non-jurisdictional is consistent with contemporary legal context.

The long and consistent characterization in American common law of statutes of limitations as non-jurisdictional matters of procedure confirms that Congress, in enacting the original predecessor to § 2501, understood the limitations period to be non-jurisdictional and waivable. Congressional intent with respect to a statutory provision should be interpreted in light of the contemporary legal context. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 71 (1992). The leading American treatise on statutes of limitations when the predecessor to § 2501 was enacted in 1863 explained that:

> Without destroying, therefore, and simply prescribing a period in which a right may be enforced; and withholding merely the remedy, after the lapse of an appointed time, for reasons of private justice and public policy, a statute of limitations, it has been uniformly considered, is no violation of the sacredness of private rights.

Fessenden) (criticizing proposal as "giv[ing] away the whole jurisdiction and power of Congress over claims against the Government" to the court); Cong. Globe, 37th Cong., 3d Sess. 395 (1863) (Sen. Clark) (proposing "not [to] give the court jurisdiction of anything except things arising under the law of Congress, or an express or implied contract").

Joseph K. Angell, *A Treatise on the Limitation of Actions At Law and Suits in Equity and Admiralty* § 22 at 17 (4th ed. 1861).

During the period when the predecessor to § 2501 was enacted, this Court consistently reiterated its understanding that statutes of limitations affect the remedy and not the underlying right of action. *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 327 (1839); *Townsend v. Jemison*, 50 U.S. (9 How.) 407, 413 (1850); *Campbell v. Holt*, 115 U.S. 620, 624-29 (1885). As this Court later explained in *Sun Oil Co. v. Wortman*, 486 U.S. 717, 725 (1988), the traditional rule in America was that "the bar of the statute does not extinguish the underlying right but merely causes the remedy to be withheld." A statute of limitations thus has been a classic example of an affirmative defense left to the defendant to raise and establish and subject to waiver or forfeiture. See Fed. R. Civ. Proc. 8(c), RCFC 8(c); see also *Henderson v. United States*, 517 U.S. 654 (1996) (holding that the Suits in Admiralty Act service of process requirement had been superseded by the Federal Rules of Civil Procedure pursuant to the direction of the Rules Enabling Act that, in matters of "practice and procedure," "[a]ll laws in conflict with such rules shall be of no further force or effect," 28 U.S.C. § 2072(a)).

The strongest evidence that the 1863 time bar was an ordinary and unexceptional statute of limitations lies in the language that Congress selected. The phrasing of the predecessor to § 2501 is comparable to that found in many state statutes of limitations of the period. Angell, *supra* at xxxiii to clxi (setting out state statutes of limitations). Had Congress wished to create a "super" statute of limitations – one that would limit the jurisdiction of a court even when the government had conceded its non-applicability – one would have expected Congress to have composed different, more direct, and more forceful language to accomplish that extraordinary jurisdictional purpose.

4. Early decisions characterizing the predecessor statute of limitations as jurisdictional constitute dicta, contradict the legislative intent, and have been superseded by recent decisions recognizing § 2501 as an unexceptional statute of limitations to be interpreted consistent with practice among private parties.

Unfortunate dicta in a series of Supreme Court decisions decided in the late 19th century, and cited into the 20th century,[7] suggested that the predecessor statute of limitations for cases in the then-Court of Claims had jurisdictional force. These decisions failed to carefully analyze the plain language of the text, ignored the legislative history, and neglected the ubiquitous legal understanding of a statute of limitations as a waivable affirmative defense.

In the first decision in this series, *Kendall v. United States*, 107 U.S. 123 (1883), the Court refused to judicially imply an additional disability as a basis for delaying accrual under the statute of limitations for the Court of Claims. Given that Congress had adopted specific delayed-accrual rules in the statute for persons with certain "disabilities" inhibiting timely presentation of a claim (married women, minors, the mentally disabled, and persons overseas) and had expressly forbidden any other disability from preventing a claim from being barred, the Court unremarkably held that it lacked "authority to engraft [another] disability upon the statute." *Id.* at 125. Despite the Court's passing reference to the time bar as having jurisdictional character, *Kendall* did not present that question as the limitations issue was not raised by the Court *sua sponte*. Indeed, the Court observed that the petition had not been filed within six years, that "[t]he government demurred, and that the petition was

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[7] See *Soriano v. United States*, 352 U.S. 270 (1957) (overturned by *Irwin*, as discussed in Part D.1 of this brief).

dismissed upon the ground that the claim was barred." *Id.* at 124; see also 2 S. Ct. at 124 (reporting that "[t]he government pleaded limitation" in the case).

In *Finn v. United States*, 123 U.S. 227, 232-33 (1887), the question before the Court was whether the executive could revive a claim that had originally been denied by the executive twelve years earlier. With respect to this second attempt by the claimant, which the executive had allowed based on newly-discovered evidence, the Court responded that "the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims." *Id.* at 233. While the predecessor to § 2501 lay in the background, that statement was addressed to a special statutory procedure by which the executive referred claims to the Court of Claims. (The present day counterpart is 28 U.S.C. § 2510, which governs referrals by the Comptroller General to the Court of Federal Claims.)

Although *United States v. Wardwell*, 172 U.S. 48, 52 (1898), declared most directly that the predecessor to § 2501 was "not merely a statute of limitations but also jurisdictional in its nature," the government there affirmatively challenged the timeliness of the action, but not the jurisdiction of the court. *Id.* at 50, 52. The question of whether the statute could be waived by the government was not presented. Thus, the supposed jurisdictional edifice for the predecessor statute to § 2501 was grounded on dicta.

Moreover, the *Kendall-Finn-Wardwell* line of cases incorporated jurisdictional concepts into the statute of limitations contrary to the legal norms of the period and without any indication of legislative intent to contravene the common legal understanding. *Finn* acknowledged "the general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions," and further allowed that "[a]n individual may

waive such a defence, either expressly or by failing to plead the statute." *Finn*, 123 U.S. at 232-33. Nonetheless, without careful analysis or explanation, *Finn* formulated the axiom that these common-place legal rules have "no application to suits in the Court of Claims against the United States." *Id.* at 232-33. In so doing, *Finn* and these other decisions departed from the Court's contemporaneous directive that "[n]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." See *Shaw v. Railroad Co.*, 101 U.S. 557, 565 (1880).

This Court has returned from the early detour from general legal understanding and now gives closer attention to the legislative intent underlying a federal statute of limitations. And this Court has done so in the very context of § 2501. In *Franconia*, after re-examining the text and historical context of the predecessor statute, the Court unanimously found § 2501 to be an "unexceptional" statute of limitations, comparable in text to "[a] number of contemporaneous state statutes of limitations applicable to suits between private parties." 536 U.S. at 145. Rejecting the government's plea in that case for a "special" rule of accrual to benefit the sovereign, the Court characterized the government's proposition as "present[ing] an 'unduly restrictive' reading of the congressional waiver of sovereign immunity, rather than 'a realistic assessment of legislative intent.'" *Id.* (citations omitted). In light of *Franconia*, as well as the Court's approval of equitable tolling of statutes of limitations applying to waivers of sovereign immunity as next discussed, the obsolete *Kendall-Finn-Wardwell* line of cases has been displaced and superseded.

D. THIS COURT DOES NOT CHARACTERIZE STATUTES OF LIMITATIONS ON CIVIL CLAIMS AGAINST THE UNITED STATES AS JURISDICTIONAL BUT INSTEAD DIRECTS THEM TO BE APPLIED IN THE SAME MANNER AS AMONG PRIVATE PARTIES.

1. This Court's decisions approving equitable adjustments to statutes of limitations applicable in federal government cases negate any characterization of these statutes of limitations as jurisdictional.

In *Irwin*, the Court rejected the lower court's ruling that a statute of limitations on a waiver of sovereign immunity was an absolute jurisdictional limit and instead allowed the limitations period for filing an employment discrimination claim against the federal government under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(c), to be equitably tolled, just as with claims against private parties. 498 U.S. at 91-96. A concurring opinion objected to equitable tolling against the federal government, citing earlier decisions holding that conditions on waivers of sovereign immunity — specifically including statutes of limitations — must be strictly observed. *Id.* at 97-100 (White, J., concurring in part and concurring in the judgment). The Court majority responded that "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Id.* at 95.

With specific and disapproving reference to an earlier case reciting 28 U.S.C. § 2501 as a jurisdictional bar, the *Irwin* Court acknowledged that "previous cases dealing with the effect of time limits in suits against the Government have not been entirely consistent." 498 U.S. at 94 (citing *Soriano v. United States*, 352 U.S. 270 (1957)). While observing that

an argument could be made that the language of § 2501 "is more stringent" than that in the Title VII limitations provision, the Court was "not persuaded that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling." *Irwin*, 498 U.S. at 95. Instead of "a continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past," the Court said that *Irwin* "affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government." *Id.*

This Court in *Irwin* thus turned deliberately and conscientiously away from the rigid jurisdictional approach previously reflected in the *Kendall-Finn-Wardwell* line of cases and perpetuated in *Soriano*. See *Irwin*, 498 U.S. at 94-95; see also *id.* at 98 (White, J., concurring in part and concurring in the judgment) (saying that the decision "directly overrules a prior decision by this Court, *Soriano v. United States*, 352 U.S. 270 (1957)"); *Wood-Ivey Systems Corp. v. United States*, 4 F.3d 961, 964 n. 4 (Fed. Cir. 1993) (concluding that, with *Irwin*, "the Supreme Court now considers [*Soriano*] to be obsolete if not overturned"); *Oropallo v. United States*, 994 F.2d 25, 29 n.4 (1st Cir. 1993) (recognizing that *Irwin* "overruled or made irrelevant" *Soriano*). *Soriano*, a decision that had refused to permit equitable tolling under § 2501, was grounded upon and shared in the mistaken jurisdictional characterization of the statute of limitations adopted in *Kendall*. See *Soriano*, 352 U.S. at 273-74 (relying primarily on *Kendall* in refusing to permit equitable tolling of § 2501). See also Calvin W. Corman, *Limitation of Actions*, § 8.2 at 290 (Supp. 1993) ("The recognition of equitable tolling by the Supreme Court in *Irwin* carries an implied holding that strict compliance with the statute of limitations is not a jurisdictional prerequisite to suing the government.").

Irwin does not stand alone in rejecting the government's insistence upon rigid or jurisdictional

application of statutes of limitations in cases involving claims against the United States. In *Bowen v. City of New York*, 476 U.S. 467 (1986), the Court reaffirmed its declaration that "the 60-day requirement [for filing claims in District Court challenging the administrative denial of disability benefits under the Social Security Act] is not jurisdictional, but rather constitutes a period of limitations." *Id.* at 478. In construing the statute of limitations to allow equitable tolling, the *Bowen* Court said it "must be careful not to 'assume the authority to narrow the waiver [of sovereign immunity] that Congress intended,'" or to construe the waiver "'unduly restrictively.'" *Id.* at 479 (citations omitted).

Subsequently, in *Scarborough v. Principi*, 541 U.S. 401 (2004), the Court relied upon *Irwin* as instructive in another context that also involved a time limitation contained in a waiver of sovereign immunity. In *Scarborough*, the Court held that an otherwise-timely application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, that did not contain the statutorily-required allegation that the government's position was not "substantially justified" may be amended to cure this defect after the 30-day filing period had expired. *Id.* at 420-421. In so holding, the Court found *Irwin* to be "enlightening on this issue," because *Irwin* recognized that limitation principles should apply to the federal government in the same way as to private parties. *Id.* The Court further said that "[o]nce Congress waives sovereign immunity, we observed [in *Irwin*], judicial application of a time prescription to suits against the Government, in the same way the prescription is applicable to private suits, 'amounts to little, if any, broadening of the congressional waiver.'"[8] *Id.* at 421 (citation omitted).

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[8]Even if the general rule applying statutes of limitations to waivers of sovereign immunity in a manner consistent with that among private parties were to be limited to a "readily identifiable private-litigation equivalent" (see *Scarborough*, 541 U.S. at 427 (Thomas, J., dissenting)), the takings claim for damages presented in this case is parallel to a private action for damages resulting from trespass to real

The rule in *Irwin* creating a presumption that statutes of limitations applicable to waivers of sovereign immunity are subject to equitable tolling cannot be reconciled with the suggestion that such provisions are jurisdictional conditions on the government's consent to suit:

First, the *Irwin* Court reversed the lower court's ruling that the statutory filing deadline for employment discrimination claims against the government "operates as an absolute jurisdictional limit." See *Irwin*, 498 U.S. at 91; see also *Bowen*, 476 U.S. at 478-79 (rejecting the argument that the Social Security Act statute of limitations is "jurisdictional," instead characterizing it as "a period of limitations" that may be equitably tolled).

Second, a truly jurisdictional provision is not subject to waiver or equitable adjustments. See *Bowles v. Russell*, slip op. at 9 (holding that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement," meaning that the "Court has no authority to create equitable exceptions to jurisdictional requirements"). The sine qua non of a jurisdictional rule is a demand for strict compliance with its terms. By adopting a general rule of equitable tolling in civil cases against the government, with specific reference to § 2501 (*Irwin*, 498 U.S. at 94-95), *Irwin* emphatically confirmed the non-jurisdictional nature of these statutes of limitations. See also *Zipes*, 455 U.S. at 393 (noting that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"); *Wood-Ivey Systems Corp.*, 4 F.3d at 969 n. 3 (Plager, J., concurring) ("Since *Irwin*, compliance with statutory time limits is no longer jurisdictional, in the old sense that when a Congressional specified time limit had expired a court had no power to entertain the case.").

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property. See Note, *Developments in the Law – Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1197 (1950).

Third, the *Irwin* Court directed that once the government has waived sovereign immunity, a statute of limitations should be applied "in the same way that it is applicable to private suits." *See id.* at 95. Among private parties, of course, a statute of limitations is an affirmative defense that may be waived. Fed. R. Civ. Proc. 8(c).

2. Once Congress has waived sovereign immunity, a statute of limitations should be applied to the government in the same manner as to private parties.

In recent decades, this Court has directed that statutes of limitations applicable to suits against the federal government generally and in the Court of Federal Claims specifically should be construed in conformity with the standards applicable to private disputes. In *Franconia*, a unanimous Court rejected the government's contention "that § 2501 creates a special accrual rule for suits against the United States." Instead, the Court directed that determination of when a claim accrues for purposes of § 2501 should proceed in the same manner and under the same legal principles as would apply in a suit among private parties. 536 U.S. at 145. Drawing upon its earlier decision in *Irwin*, the Court declared "that limitations principles should generally apply to the Government 'in the same way that' they apply to private parties." *Franconia*, 536 U.S. at 145; see also *Irwin*, 498 U.S. at 95-96 ("once Congress has made such a waiver [of immunity covering a particular type of claim]," then the principle of equitable tolling of the statute of limitations should be "applicable to suits against the Government, in the same way that it is applicable to private suits").

In the context of private litigants, of course, a statute of limitations is an affirmative defense that the defendant must plead and establish. See Fed. R. Civ. Proc. 8(c). Rather than being "a jurisdictional prerequisite," "a statute of

limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes*, 455 U.S. at 393. "A statute of limitations defense * * * is not 'jurisdictional,' hence courts are under no *obligation* to raise the time bar *sua sponte*." *Day v. McDonough*, 547 U.S. 198, 205 (2006) (emphasis in original).

This Court's treatment of statutes of limitations in a manner consistent with ordinary expectations arising in private litigation, in contrast with its approach toward those statutes that grant permission to sue the sovereign and define the scope of cognizable claims (for which the Court has occasionally upheld special and narrow rules in favor of the government) reflects an appreciation of the distinct differences between these types of provisions and the contrast in public policy implications. Compare *Library of Congress v. Shaw*, 478 U.S. 310, 317-19 (1986) (strictly construing the amenability to suit of the United States under Title VII and declining to hold the government responsible for the remedy of interest absent express congressional consent) with *Irwin*, 498 U.S. at 93-96 (holding that the limitations period on claims against the United States arising under that same statute — Title VII — need not be strictly enforced and allowing equitable tolling of the statute of limitations).

3. *Bowles v. Russell* does not apply to statutes of limitations, does not override the traditional rule that a statute of limitations is a non-jurisdictional affirmative defense, and does not contradict *Irwin* or *Franconia*.

This Court's recent decision in *Bowles v. Russell*, 551 U.S. ___, No. 06-5306 (U.S., June 14, 2007), does not reverse course from *Irwin*, *Bowen*, and *Scarborough*. *Bowles* confirmed the venerable rule that filing a timely notice of appeal is "an event of jurisdictional significance" because "it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case

involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam). Indeed, as the government explained in its amicus brief in *Bowles*: "A statute governing the timing of an appeal is jurisdictional because it identifies the point at which the subject matter jurisdiction of the lower court ends and that of the appellate court begins." Brief for the United States as Amicus Curiae Supporting Respondent in *Bowles v. Russell*, No. 06-5306 (U.S.), p.10. By contrast, in the present case, it is undisputed that the takings claim alleged by John R. Sand falls comfortably within the subject matter jurisdiction of the Court of Federal Claims under the Tucker Act. See also *Scarborough*, 541 U.S. at 413 (a statutory time prescription for filing a petition for an award of attorney's fees under the Equal Access to Justice Act is not jurisdictional given that the court already had taken subject matter jurisdiction over the underlying action).

Importantly, the majority opinion in *Bowles* neither mentioned statutes of limitations nor disturbed this Court's precedents in *Irwin* and *Franconia*, which held that statutes of limitations, even those applicable to waivers of sovereign immunity, should be applied in a manner consistent with the rules that apply to private parties. Moreover, nothing in *Bowles* contradicts this Court's near-unanimous declaration just one year earlier in *Day v. McDonough*, 547 U.S. at 207-208,[9] that a federal statute of limitations is not jurisdictional and may be waived. See *Bowles*, dissenting op. at 5 (Souter, J., dissenting) (observing, without disagreement by the majority, that a statute of limitations is an affirmative defense, is not jurisdictional, and may be waived).

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[9]In *Day*, with the exception of Justice Stevens, who believed the Court should postpone the entry of judgment pending the decision of another case before the Court, those Justices in the majority and in dissent agreed that a federal statute of limitations is not jurisdictional and may be waived. *Day*, 547 U.S. at 212 (Scalia, J., dissenting) (emphasizing "the traditional forfeiture rule for unpleaded limitations defenses").

A notice of appeal in a civil case that transfers a case from the lower court to the appellate court has consistently been held to be jurisdictional in nature. *Bowles*, slip op. at 4-5. By contrast, as discussed above, statutes of limitations just as consistently and throughout our history have been treated as affirmative defenses that may be forfeited or waived.

4. The canon that waivers of sovereign immunity are construed in favor of the sovereign does not permit reformulation of § 2501 from a procedural to a jurisdictional statute.

Waivers of sovereign immunity must be unequivocally expressed in the statutory text. *Irwin*, 498 U.S. at 95; *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). Conditions or limitations on waivers of sovereign immunity are to be strictly construed in favor of the government and not lightly implied. *United States v. Sherwood*, 312 U.S. 584, 591 (1941). Yet this Court cannot read waivers of sovereign too broadly or too narrowly:

> Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.

Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955) (Federal Tort Claims Act). See *Irwin*, 498 U.S. at 96 (equitable tolling doctrine applies to suits against the government); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979) (Federal Tort Claims Act).

First, a waiver of sovereign immunity is congruent with a court's subject matter jurisdiction over actions against the government, because the terms of the waiver define the

court's jurisdiction. *Sherwood*, 312 U.S. at 586. Given that the terms of the government's consent to be sued delineate the scope of the court's jurisdiction, to interpret § 2501 as a condition on a waiver of sovereign immunity and thus as limiting the subject matter jurisdiction of the Court of Federal Claims would be circular. As discussed in Part A of this brief, § 2501 by its express terms assumes that jurisdiction already has attached before the limitations period is to be applied. If § 2501 is read to be a jurisdictional condition on the waiver, then § 2501 must be read to limit the jurisdictional authority of the Court of Federal Claims, which in turn defeats the very assumption of preexisting jurisdiction expressed in the plain language of the statute.

Second, for purposes of the canon of strict construction, the scope of a waiver of sovereign immunity should be defined by those terms and exceptions actually incorporated within the statutory provision that accomplishes the waiver. See *Lane v. Pena*, 518 U.S. 187, 192 (1996) ("[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign."). For example, the Tucker Act specifically provides that the jurisdictional grant to the Court of Federal claims and the waiver for certain claims against the United States applies only to "cases not sounding in tort." 28 U.S.C. § 1491(a)(1). Accordingly, this Court has long recognized the tort exception in § 1491(a)(1) as limiting the jurisdiction of the Court of Federal Claims. *Basso v. United States*, 239 U.S. 602 (1916); see also *Jentoft v. United States*, 450 F.3d 1342, 1349 (Fed. Cir. 2006) (same). By contrast, § 2501 is codified separately from the jurisdiction and waiver statute, serves as a general statute of limitations applicable to all claims in the Court of Federal Claims, and is not attached to any particular jurisdictional waiver. Moreover, § 2501 is not plausibly construed as a condition on the waiver that defines subject matter jurisdiction, because § 2501 assumes Court of Federal Claims jurisdiction over the claim based upon an unambiguous waiver of sovereign immunity, such as that

contained in § 1491(a)(1), *United States v. Mitchell*, 463 U.S. at 215-216, and applicable to a takings claim as presented in this case, *Causby*, 328 U.S. at 267.

Third, even if another limitations provision incorporated within a different statute waiving federal sovereign immunity might be construed through the canon of strict construction to constitute a condition on that waiver, see *Block v. North Dakota*, 461 U.S. at 287, such a statute-specific interpretation cannot be extrapolated to impose a jurisdictional character on 28 U.S.C. § 2501 in a manner contrary to its own statutory text and structure. For purposes of claims in the Court of Federal Claims, the waiver of sovereign immunity, and its attendant conditions, are now found in the jurisdictional Chapter 91 of the Judicial Code (see Part B.2 of this brief). By contrast, the Court of Federal Claims procedural Chapter 165 does not confer or withhold subject matter jurisdiction, but rather describes the manner in which the Court of Federal Claims will exercise jurisdiction already conferred (see Part B.3 of this brief). Section 2501 should not be construed as a direct condition on the waiver. Indeed, the rule of strict construction for waivers of sovereign immunity is most naturally applied to attempts to augment monetary claims against the United States, *United States v. Idaho*, 508 U.S. 1, 7-8 (1993) (citing cases), rather than procedural matters, see *Irwin* (equitable tolling of statute of limitations) and *Franconia* (accrual of statute of limitations).

Importantly, the canon of strict construction should be understood as a tool that assists interpretation, not as a substitute for careful attention to the statutory language actually enacted by Congress and the statutory structure deliberately selected by Congress. Even if this Court were ordinarily to interpret procedural rules strictly to accomplish a "restrictive legislative purpose when Congress relinquishes sovereign immunity," *Honda v. Clark*, 386 U.S. 484, 501 (1967) (dicta, citing *Kendall, Sherwood* and *Soriano*), an interpretive method may not override the plain language and structure of the statute. See *United States v. Brown*, 333 U.S.

18, 25 (1948) ("The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose.") (addressing maxim that penal statutes are to be strictly construed); *United States v. Williams*, 514 U.S. 527, 541 (1995) (Scalia, J., concurring) (stating that the rule of "clear statement of waivers of sovereign immunity" does not "require explicit waivers to be given a meaning that is implausible" nor permit "restricting the unequivocal language" of explicit waivers).

Fourth, the canon of strict construction is misplaced when applied to a self-executing constitutional claim. While the Tucker Act provides a judicial remedy for a taking claim against the federal government, the underlying constitutional right to just compensation does not depend on the consent of Congress. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) ("claims for just compensation are grounded in the Constitution itself"). Indeed, despite the general rule barring an award of interest against the federal government absent an express statutory grant, this Court held in *Jacobs v. United States*, 290 U.S. 13, 16-17 (1933), that, by constitutional command, interest running from the time of the taking must be paid as an element of just compensation under the Fifth Amendment. If the very scope of the remedy for a taking claim is not subject to a canon of strict construction, much less, then, should a procedural time limitation enacted by Congress be construed strictly in favor of the government and against the constitutional claimant. While "[t]he remedy afforded by the Fifth Amendment is subject to a reasonable time bar designed to protect other important societal values," *Hair v. United States*, 350 F.3d 1253, 1260 (Fed. Cir. 2003), transforming an unexceptional statute of limitations into a jurisdictional bar is not a reasonable constraint on a self-executing constitutional claim.

Finally, even if it were applicable to a statute of limitations separately codified as a procedural measure and specifically as applicable to a self-executing constitutional

claim, the canon that a condition on a waiver of sovereign immunity should be strictly construed in favor of the government would not justify reformulation of § 2501 into a jurisdictional statute that limits the adjudicatory authority of the Court of Federal Claims. Observing the canon might mean that equitable tolling would not be available under §2501 (although *Irwin* and *Franconia* suggest otherwise). Observing the canon could mean that a claimant would not be able to argue that the government is estopped from asserting the statute of limitations defense based upon government misconduct before or during litigation.

In any event, a parsing of theories of statutory construction should not be necessary in this case. The question here is not what interpretive method – strict, liberal, or ordinary – should be applied to ascertain the meaning of the limitations statute as applied in a particular context or to a particular set of circumstances. Rather, the sole issue is whether § 2501 should be characterized as a *jurisdictional* statute.

E. CONSTRUING § 2501 AS NON-JURISDICTIONAL SERVES TO REDUCE JUDICIAL BURDENS AND PROMOTES EFFICIENT LITIGATION.

Given the longstanding rule that permission to sue the United States must be unequivocally and unambiguously expressed, this Court understandably has shown solicitude for unique governmental interests when determining whether Congress has consented to suit and in construing the breadth of a statutory waiver of sovereign immunity. Questions regarding when civil litigation is an appropriate response to harms caused by governmental activities, which claims are suited for the judicial venue rather than redressed by legislation, the types and theories of liability that should be recognized in suits alleging governmental wrongs, and the forms of relief that may be imposed against the government

as an entity, all go to the very core of the concept of sovereign immunity and its grounding in constitutional separation of powers.

By contrast, the purposes underlying a general statute of limitations are essentially equivalent for both the federal government and private parties. Statutes of limitations "are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); see also Cong. Globe, 36th Cong., 1st Sess. 984 (1860) (Sen. Bayard) (describing the proposed statute of limitations for the Court of Claims as based on the concern that "the transaction [may be] so remote, and the evidence so imperfect, that the Government cannot meet it"). The primary purpose of a statute of limitations is fairness to the defendant (see Note, *Developments in the Law – Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1185 (1950) (quoting *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944)), rather than protection of the sovereign government from unconsented claims. The animating principles behind a statute of limitations do not justify a special rule that would excuse the government from the traditional rule of waiver when the timeliness of an action is unchallenged in an answering pleading or, as here, is conceded.

Indeed, to impose a duty upon the courts to investigate the timeliness of claims and calculate when a claim accrued – even when the government has conceded the point – adds to the burdens on the judiciary and expands the subjects for litigation. In application of § 2501, questions of law about when the claim accrues for a class of claims and disputes of fact concerning application of the accrual rule in a case are frequently complex and contested, and not like the kind of issues typically resolved as a threshold jurisdictional inquiry. See, *e.g.*, *Franconia*, 535 U.S. at 141-48

(considering when a contract claim accrues in the context of a repudiation of a contractual duty); opinion below, Pet. App. 20a-28a, 38a-39a (consideration in this case by a divided court whether a claim for a permanent physical taking of a portion of real property first accrues from the date of the government's earlier temporary exclusion of the property holder from another portion of the property).

To deny jurisdictional status to a statute of limitations would not throw the courthouse door wide open to stale and untimely claims. Nor would such a rule denigrate the importance of diligent presentation of claims against the federal government. When a claim is arguably untimely, the government is quite capable of so asserting and, as the decisions reported in the Federal Reporter, the Federal Supplement and the Federal Claims Reporter illustrate, the government has hardly been timid in asserting statutes of limitations when faced with affirmative claims of liability.

In the present case, the government did question the timeliness of the lawsuit and initially litigated that question before the Court of Federal Claims. Subsequently and based upon the development of the evidentiary record, the government deliberately abandoned that objection, stipulated to the accrual date in the trial court, and conceded on appeal that the claim had accrued within the statute of limitations. Given "this clear waiver and concession by the government" (dissent below, Pet App. 38a), neither solicitude for a public defendant nor the interests of fair and effective adjudication of claims against the sovereign validate judicial resurrection and re-adjudication of an issue definitively resolved to the satisfaction of the government.

F. THE COURT OF APPEALS DISMISSAL MAY NOT BE AFFIRMED AS AN EXERCISE OF DISCRETION TO RAISE *SUA SPONTE* THE TIMELINESS OF A LAWSUIT WHEN THAT COURT SQUARELY DECIDED THE ISSUE AS A MATTER OF JURISDICTION AND THE GOVERNMENT DELIBERATELY WAIVED THE STATUTE OF LIMITATIONS DEFENSE.

This Court granted review in this case solely to address the question whether the statute of limitations limits the subject matter jurisdiction of the Court of Federal Claims. Thus, whether and when an appellate court may *sua sponte* question the application of a non-jurisdictional time limitation is not before the Court. Moreover, the court of appeals below grounded its decision squarely on the purported jurisdictional nature of the statute of limitations, not as an exercise of judicial discretion. Panel majority below, Pet. App. 28a ("we decide the case on jurisdictional grounds"). Nevertheless, to definitively conclude the matter, this Court should confirm that the court of appeals on remand should not address the statute of limitations.

Even though a federal court may have discretion under special circumstances to raise the timeliness of a lawsuit on its own initiative, it would "count" as an "abuse of discretion" for a court to override a party's "deliberate waiver of a limitations defense." *Day v. McDonough*, 547 U.S. at 202 (allowing the federal court to correct the state's error in failing to raise a time bar when the failure involved "an evident miscalculation of the elapsed time under a statute designed to impose a tight time constraint on federal habeas petitioners").

No special circumstances occurred in this case such that a court of appeals *sua sponte* should have raised the non-jurisdictional statute of limitations defense. In this case, the government not only (1) agreed with John R. Sand in the Court of Federal Claims that John R. Sand had not been

clearly and permanently excluded by the government from the property until a point in time within the six-year time statutory period (dissent below, Pet. App. 38a, quoting government's filing in the trial record, J.A. 37a-40a), but (2) chose not to challenge the timeliness of John R. Sand's lawsuit on appeal, and (3) forthrightly conceded during oral argument before the court of appeals that John R. Sand's claim had accrued within the six year statutory period and therefore was not barred by the statute of limitations (Pet. App. 14a).

CONCLUSION

The judgment of the court of appeals should be reversed, the dismissal of John R. Sand's complaint should be vacated, and this case should be remanded for further proceedings on the merits.

Respectfully submitted,

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§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)(1) Both the Unites [1] States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

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[1] So in original. Probably should be "United".

§ 1492. Congressional reference cases

Any bill, except a bill for a pension, may be referred by either House of Congress to the chief judge of the United States Court of Federal Claims for a report in conformity with section 2509 of this title.

§ 1494. Accounts of officers, agents or contractors

The United States Court of Federal Claims shall have jurisdiction to determine the amount, if any, due to or from the United States by reason of any unsettled account of any officer or agent of, or contractor with, the United States, or a guarantor, surety or personal representative of any such officer, agent or contractor, and to render judgment thereof,[1] where—

(1) claimant or the person he represents has applied to the proper department of the Government for settlement of the account;

(2) three years have elapsed from the date of such application without settlement; and

(3) no suit upon the same has been brought by the United States.

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[1] So in original. Probably should be "thereon,".

§ 1495. Damages for unjust conviction and imprisonment; claim against United States

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned.

§ 1496. Disbursing officers' claims

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim by a disbursing officer of the United States or by his administrator or executor for relief from responsibility for loss, in line of duty, of Government funds, vouchers, records or other papers in his charge.

§ 1497. Oyster growers' damages from dredging operations

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim for damages to oyster growers on private or leased lands or bottoms arising from dredging operations or use of other machinery and equipment in making river and harbor improvements authorized by Act of Congress.

§ 1498. Patent and copyright cases

(a) Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture. Reasonable and entire compensation shall include the owner's reasonable costs, including reasonable fees for expert witnesses and attorneys, in pursuing the action if the owner is an independent inventor, a nonprofit organization, or an entity that had no more than 500 employees at any time during the 5-year period preceding the

use or manufacture of the patented invention by or for the United States. Nothwithstanding [1] the preceding sentences, unless the action has been pending for more than 10 years from the time of filing to the time that the owner applies for such costs and fees, reasonable and entire compensation shall not include such costs and fees if the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

The court shall not award compensation under this section if the claim is based on the use or manufacture by or for the United States of any article owned, leased, used by, or in the possession of the United States prior to July 1, 1918.

A Government employee shall have the right to bring suit against the Government under this section except where he was in a position to order, influence, or induce use of the invention by the Government. This section shall not confer a right of action on any patentee or any assignee of such patentee with respect to any invention discovered or invented by a person while in the employment or service of the United States, where the invention was related to the official functions of the employee, in cases in which such functions included research and development, or in the making of which Government time, materials or facilities were used.

(b) Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the

Government, the exclusive action which may be brought for such infringement shall be an action by the copyright owner against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 504 (c) of title 17, United States Code: Provided, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government: Provided, however, That this subsection shall not confer a right of action on any copyright owner or any assignee of such owner with respect to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: And provided further, That before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the Government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement and to settle the claim administratively out of available appropriations.

Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action, except that the period between the date of receipt of a written claim for compensation by the Department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of mailing by the Government of a

notice to the claimant that his claim has been denied shall not be counted as a part of the three years, unless suit is brought before the last-mentioned date.

(c) The provisions of this section shall not apply to any claim arising in a foreign country.

(d) Hereafter, whenever a plant variety protected by a certificate of plant variety protection under the laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government, and with the authorization and consent of the Government, the exclusive remedy of the owner of such certificate shall be by action against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement: Provided, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the protected plant variety by the Government: Provided, however, That this subsection shall not confer a right of action on any certificate owner or any assignee of such owner with respect to any protected plant variety made by a person while in the employment or service of the United States, where such variety was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: And provided further, That before such action against the United States has been instituted, the appropriate corporation owned or controlled by the United States or the head of the appropriate agency of the Government, as the case may be, is authorized to enter into an agreement with the certificate owner in full settlement and compromise, for the damages accrued to him by reason of such infringement and to settle the claim administratively out of available appropriations.

(e) Subsections (b) and (c) of this section apply to exclusive rights in mask works under chapter 9 of title 17, and to exclusive rights in designs under chapter 13 of title 17, to the same extent as such subsections apply to copyrights.

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[1] So in original. Probably should be "Notwithstanding".

§ 1499. Liquidated damages withheld from contractors under Contract Work Hours and Safety Standards Act

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim for liquidated damages withheld from a contractor or subcontractor under section 3703 of title 40.

§ 1500. Pendency of claims in other courts

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

§ 1501. Pensions

The United States Court of Federal Claims shall not have jurisdiction of any claim for a pension.

§ 1502. Treaty cases

Except as otherwise provided by Act of Congress, the United States Court of Federal Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations.

§ 1503. Set-offs

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court.

§ 1505. Indian claims

The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

§ 1507. Jurisdiction for certain declaratory judgments

The United States Court of Federal Claims shall have jurisdiction to hear any suit for and issue a declaratory judgment under section 7428 of the Internal Revenue Code of 1986.

§ 1508. Jurisdiction for certain partnership proceedings

The Court of Federal Claims shall have jurisdiction to hear and to render judgment upon any petition under section 6226 or 6228(a) of the Internal Revenue Code of 1986.

§ 1509. No jurisdiction in cases involving refunds of tax shelter promoter and understatement penalties

The United States Court of Federal Claims shall not have jurisdiction to hear any action or proceeding for any refund or credit of any penalty imposed under section 6700 of the Internal Revenue Code of 1986 (relating to penalty for promoting abusive tax shelters, etc.) or section 6701 of such Code (relating to penalties for aiding and abetting understatement of tax liability).

§ 2501. Time for filing suit

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the Government Accountability Office fails to act within six months after receiving the account.

§ 2502. Aliens' privilege to sue

(a) Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the United States Court of Federal Claims if the subject matter of the suit is otherwise within such court's jurisdiction.

(b) See section 7422(f) of the Internal Revenue Code of 1986 for exception with respect to suits involving internal revenue taxes.

§ 2503. Proceedings generally

(a) Parties to any suit in the United States Court of Federal Claims may appear before a judge of that court in person or by attorney, produce evidence, and examine witnesses.

(b) The proceedings of the Court of Federal Claims shall be in accordance with such rules of practice and procedure (other than the rules of evidence) as the Court of Federal Claims may prescribe and in accordance with the Federal Rules of Evidence.

(c) The judges of the Court of Federal Claims shall fix times for trials, administer oaths or affirmations, examine witnesses, receive evidence, and enter dispositive judgments. Hearings shall, if convenient, be held in the counties where the witnesses reside.

(d) For the purpose of construing sections 1821, 1915, 1920, and 1927 of this title, the United States Court of Federal Claims shall be deemed to be a court of the United States.

§ 2504. Plaintiff's testimony

The United States Court of Federal Claims may, at the instance of the Attorney General, order any plaintiff to appear, upon reasonable notice, before any judge of the court and be examined on oath as to all matters pertaining to his claim. Such examination shall be reduced to writing by the judge, and shall be returned to and filed in the court, and may, at the discretion of the attorneys for the United States, be read and used as evidence on the trial. If any plaintiff, after such order is made and due and reasonable notice thereof is given to him, fails to appear, or refuses to testify or answer fully as to all material matters within his knowledge, the court may order that the case shall not be tried until he fully complies with such order.

§ 2505. Trial before judges

Any judge of the United States Court of Federal Claims may sit at any place within the United States to take evidence and enter judgment.

§ 2506. Interest of witness

A witness in a suit in the United States Court of Federal Claims shall not be exempt or disqualified because he is a party to or interested in such suit.

§ 2507. Calls and discovery

(a) The United States Court of Federal Claims may call upon any department or agency of the United States or upon any party for any information or papers, not privileged, for purposes of discovery or for use as evidence. The head of any

department or agency may refuse to comply with a call issued pursuant to this subsection when, in his opinion, compliance will be injurious to the public interest.

(b) Without limitation on account of anything contained in subsection (a) of this section, the court may, in accordance with its rules, provide additional means for the discovery of any relevant facts, books, papers, documents or tangible things, not privileged.

(c) The Court of Federal Claims may use all recorded and printed reports made by the committees of the Senate or House of Representatives.

§ 2508. Counterclaim or set-off; registration of judgment

Upon the trial of any suit in the United States Court of Federal Claims in which any setoff, counterclaim, claim for damages, or other demand is set up on the part of the United States against any plaintiff making claim against the United States in said court, the court shall hear and determine such claim or demand both for and against the United States and plaintiff.

If upon the whole case it finds that the plaintiff is indebted to the United States it shall render judgment to that effect, and such judgment shall be final and reviewable.

The transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records and shall be enforceable as other judgments.

§ 2509. Congressional reference cases

(a) Whenever a bill, except a bill for a pension, is referred by either House of Congress to the chief judge of the United States Court of Federal Claims pursuant to section 1492 of this title, the chief judge shall designate a judge as hearing officer for the case and a panel of three judges of the

court to serve as a reviewing body. One member of the review panel shall be designated as presiding officer of the panel.

(b) Proceedings in a congressional reference case shall be under rules and regulations prescribed for the purpose by the chief judge who is hereby authorized and directed to require the application of the pertinent rules of practice of the Court of Federal Claims insofar as feasible. Each hearing officer and each review panel shall have authority to do and perform any acts which may be necessary or proper for the efficient performance of their duties, including the power of subpena and the power to administer oaths and affirmations. None of the rules, rulings, findings, or conclusions authorized by this section shall be subject to judicial review.

(c) The hearing officer to whom a congressional reference case is assigned by the chief judge shall proceed in accordance with the applicable rules to determine the facts, including facts relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy. He shall append to his findings of fact conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant.

(d) The findings and conclusions of the hearing officer shall be submitted by him, together with the record in the case, to the review panel for review by it pursuant to such rules as may be provided for the purpose, which shall include provision for submitting the report of the hearing officer to the parties for consideration, exception, and argument before the panel. The panel, by majority vote, shall adopt or modify the findings or the conclusions of the hearing officer.

(e) The panel shall submit its report to the chief judge for transmission to the appropriate House of Congress.

(f) Any act or failure to act or other conduct by a party, a witness, or an attorney which would call for the imposition of sanctions under the rules of practice of the Court of Federal Claims shall be noted by the panel or the hearing officer at the time of occurrence thereof and upon failure of the delinquent or offending party, witness, or attorney to make prompt compliance with the order of the panel or the hearing officer a full statement of the circumstances shall be incorporated in the report of the panel.

(g) The Court of Federal Claims is hereby authorized and directed, under such regulations as it may prescribe, to provide the facilities and services of the office of the clerk of the court for the filing, processing, hearing, and dispatch of congressional reference cases and to include within its annual appropriations the costs thereof and other costs of administration, including (but without limitation to the items herein listed) the salaries and traveling expenses of the judges serving as hearing officers and panel members, mailing and service of process, necessary physical facilities, equipment, and supplies, and personnel (including secretaries and law clerks).

§ 2510. Referral of cases by Comptroller General

(a) The Comptroller General may transmit to the United States Court of Federal Claims for trial and adjudication any claim or matter of which the Court of Federal Claims might take jurisdiction on the voluntary action of the claimant, together with all vouchers, papers, documents, and proofs pertaining thereto.

(b) The Court of Federal Claims shall proceed with the claims or matters so referred as in other cases pending in such Court and shall render judgment thereon.

§ 2511. Accounts of officers, agents or contractors

Notice of suit under section 1494 of this title shall be given to the Attorney General, to the Comptroller General, and to the head of the department requested to settle the account in question.

The judgment of the United States Court of Federal Claims in such suit shall be conclusive upon the parties, and payment of the amount found due shall discharge the obligation.

The transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records, and shall be enforceable as other judgments.

§ 2512. Disbursing officers; relief

Whenever the United States Court of Federal Claims finds that any loss by a disbursing officer of the United States was without his fault or negligence, it shall render a judgment setting forth the amount thereof, and the Government Accountability Office shall allow the officer such amount as a credit in the settlement of his accounts.

§ 2513. Unjust conviction and imprisonment

(a) Any person suing under section 1495 of this title must allege and prove that:

(1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated

ground of innocence and unjust conviction and

(2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

(c) No pardon or certified copy of a pardon shall be considered by the United States Court of Federal Claims unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired.

(d) The Court may permit the plaintiff to prosecute such action in forma pauperis.

(e) The amount of damages awarded shall not exceed $100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and $50,000 for each 12-month period of incarceration for any other plaintiff.

§ 2514. Forfeiture of fraudulent claims

A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.

In such cases the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture.

§ 2515. New trial; stay of judgment

(a) The United States Court of Federal Claims may grant a plaintiff a new trial on any ground established by rules of common law or equity applicable as between private parties.

(b) Such court, at any time while any suit is pending before it, or after proceedings for review have been instituted, or within two years after the final disposition of the suit, may grant the United States a new trial and stay the payment of any judgment upon satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done the United States.

§ 2516. Interest on claims and judgments

(a) Interest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof.

(b) Interest on a judgment against the United States affirmed by the Supreme Court after review on petition of the United States is paid at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.

§ 2517. Payment of judgments

(a) Except as provided by the Contract Disputes Act of 1978, every final judgment rendered by the United States Court of Federal Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the Secretary of the Treasury of a certification of the judgment by the clerk and chief judge of the court.

(b) Payment of any such judgment and of interest thereon shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy, unless the judgment is designated a partial judgment, in which event only the matters described therein shall be discharged.

§ 2519. Conclusiveness of judgment

A final judgment of the United States Court of Federal Claims against any plaintiff shall forever bar any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy.

§ 2521. Subpoenas and incidental powers

(a) Subpoenas requiring the attendance of parties or witnesses and subpoenas requiring the production of books, papers, documents or tangible things by any party or witness having custody or control thereof, may be issued for purposes of discovery or for use of the things produced as evidence in accordance with the rules and orders of the court. Such subpoenas shall be issued and served and compliance therewith shall be compelled as provided in the rules and orders of the court.

(b) The United States Court of Federal Claims shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority as—

(1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) misbehavior of any of its officers in their official transactions; or

(3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

(c) The United States Court of Federal Claims shall have

such assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States. The United States marshal for any district in which the Court of Federal Claims is sitting shall, when requested by the chief judge of the Court of Federal Claims, attend any session of the Court of Federal Claims in such district.

§ 2522. Notice of appeal

Review of a decision of the United States Court of Federal Claims shall be obtained by filing a notice of appeal with the clerk of the Court of Federal Claims within the time and in the manner prescribed for appeals to United States courts of appeals from the United States district courts.

201

SOFT No. 06-1164

In the Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals erred by addressing the timeliness of petitioner's complaint even though the government did not argue on appeal that the suit was barred by the six-year limitations period contained in 28 U.S.C. 2501.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provision involved 2
Statement 2
Summary of argument 8
Argument:
Section 2501's bar to claims filed more than six years after their accrual establishes a non-waivable jurisdictional limit on the authority of the Court of Federal Claims to enter a money judgment against the United States 11
A. This Court has repeatedly construed Section 2501 and its statutory predecessors as imposing a non-waivable jurisdictional restriction on the authority of the CFC 13
B. There are sound reasons for treating Section 2501 as an exception to the general rule that limitations periods for commencing suit are non-jurisdictional 22
C. The text of current 28 U.S.C. 2501 provides no sound basis for departing from this Court's consistent holdings that Section 2501 and its predecessors establish a non-waivable jurisdictional limit on the CFC's authority 29
D. Petitioner's reliance on the structure of Title 28 is misplaced 33
E. This Court's decisions construing the six-year filing requirement as a jurisdictional limit on the authority of the Court of Claims remain good law 36
Conclusion 42

TABLE OF AUTHORITIES

Cases: Page

Agency Holding Corp. v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987) 27
Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 36
Block v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273 (1983) 23
Bowen v. *City of New York*, 476 U.S. 467 (1986) 40
Bowles v. *Russell*, 127 S. Ct. 2360 (2007) 10, 27, 28, 35, 36, 41
Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 20
Clark v. *Martinez*, 543 U.S. 371 (2005) 24
Cort v. *Ash*, 422 U.S. 66 (1975) 20
Day v. *McDonough*, 126 S. Ct. 1675 (2006) 7, 41
De Arnaud v. *United States*, 151 U.S. 483 (1894) 17, 21, 22
Eberhart v. *United States*, 546 U.S. 12 (2005) 21
Engel v. *Davenport*, 271 U.S. 33 (1926) 27
FDIC v. *Meyer*, 510 U.S. 471 (1994) 23, 30
Finn v. *United States*, 123 U.S. 227 (1887) ..... *passim*
Fourco Glass Co. v. *Transmirra Prods. Corp.*, 353 U.S. 222 (1957) 31
Franconia Assocs. v. *United States*, 536 U.S. 129 (2002) 40
Guaranty Trust Co. v. *York*, 326 U.S. 99 (1945) 26
Hornback v. *United States*, 52 Fed. Cl. 374, aff'd, 55 Fed. Appx. 536 (Fed. Cir. 2002) 5
Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 36, 37, 38, 39, 40

Cases—Continued: Page

Jackson v. *Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) 20
Jinks v. *Richland County*, 538 U.S. 456 (2003) 26
Keene Corp. v. *United States*, 508 U.S. 200 (1993) 31
Kendall v. *United States*, 107 U.S. 123 (1883) 14, 21, 29, 37, 38, 39
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 21
Lorillard v. *Pons*, 434 U.S. 575 (1978) 20
Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) 5
Lynch v. *United States*, 292 U.S. 571 (1934) 24
McAllister v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958) 27
McElrath v. *United States*, 102 U.S. 426 (1880) 14
Munro v. *United States*, 303 U.S. 36 (1938) 18, 26
Newman-Green, Inc. v. *Alfonzo-Larrain*, 490 U.S. 826 (1989) 31
OPM v. *Richmond*, 496 U.S. 414 (1990) 25
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 19
Peters v. *Hobby*, 349 U.S. 331 (1955) 41
Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986 (1984) 12
Ruhrgas AG v. *Marathon Oil Co.*, 526 U.S. 574 (1999) 28
Scarborough v. *Principi*, 541 U.S. 401 (2004) 41
Soriano v. *United States*, 352 U.S. 270 (1957) ... 19, 31, 39
Square D. Co. v. *Niagra Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) 20

Cases—Continued: Page

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 28
Sun Oil Co. v. *Wortman*, 486 U.S. 717 (1988) 26
United States v. *Beggerly*, 524 U.S. 38 (1998) 38
United States v. *Brockamp*, 519 U.S. 347 (1997) 38
United States v. *Dalm*, 494 U.S. 596 (1990) 23
United States v. *Greathouse*, 166 U.S. 601 (1897) 17
United States v. *Lippitt*, 100 U.S. 663 (1879) 14, 15, 16
United States v. *Mitchell*, 463 U.S. 206 (1983) 13, 23, 24, 25
United States v. *Mottaz*, 476 U.S. 834 (1986) 23
United States v. *New York*, 160 U.S. 598 (1896) 17, 22
United States v. *Sherwood*, 312 U.S. 584 (1941) 23
United States v. *Sioux Nation of Indians*, 448 U.S. 371 (1980) 25
United States v. *Wardwell*, 172 U.S. 48 (1898) 17, 18
Williamson County Reg'l Planning Comm'n v. *Hamilton Bank*, 473 U.S. 172 (1985) 12

Constitution, statutes and rules:

U.S. Const.:
Art. I 9, 25
§ 8, Cl. 1 25
§ 9, Cl. 7 ..... 24, 25
Appropriations Clause 25
Amend. V 5, 12, 24
Just Compensation Clause 24
Amend. VII 13

Statutes and rules—Continued: Page

Act of Feb. 24, 1855, ch. 122, § 7, 10 Stat. 612 13
Act of Mar. 3, 1863, ch. 92, 12 Stat. 765:
§ 2, 12 Stat. 765 34
§ 3, 12 Stat. 767 34
§ 10, 12 Stat. 767 ..... 13, 29, 30, 34, 38
Act of Mar 3, 1911, ch. 231, 36 Stat. 1087 18
§ 145, 36 Stat. 1136 35
§ 156, 36 Stat. 1139 ..... 18, 35
Act of June 25, 1948, ch. 646, 62 Stat. 869:
§ 33, 62 Stat. 991 34
§ 2501, 62 Stat. 976 18
Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* 2
Social Security Act, 42 U.S.C. 405(g) (1982) 40, 41
Tucker Act, ch. 359, 24 Stat. 505 16
§ 1, 24 Stat. 505 ..... 16, 17, 35
§ 6, 24 Stat. 506 26
§ 16, 24 Stat. 508 17
Rev. Stat. (1878): 25
§ 1059 34
§ 1060 34
§ 1069 ..... *passim*
28 U.S.C. 171(a) 25
28 U.S.C. 763 (1946) 26
28 U.S.C. 1291-1296 35
28 U.S.C. 1491 ..... 10, 30, 34

Statutes and rules—Continued: Page

28 U.S.C. 1497 5
28 U.S.C. 2101-2113 35
28 U.S.C. 2107(a) 35
28 U.S.C. 2501 ..... *passim*
Fed. Cl. R. 55(b) 26
Fed. R. Civ. P. 55(e) 26

Miscellaneous:

William W. Barron, *The Judicial Code 1948 Revision*, 8 F.R.D. 439 (1948) 31
Black's Law Dictionary (6th ed. 1990) 30
H.R. Rep. No. 308, 80th Cong., 1st Sess. (1947) 18, 26, 31
S. Rep. No. 388, 61st Cong., 2d Sess. (1910) 18

In the Supreme Court of the United States

No. 06-1164

JOHN R. SAND & GRAVEL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 457 F.3d 1345. The opinion of the Court of Federal Claims (CFC) (Pet. App. 41a-126a) following a bench trial is reported at 62 Fed. Cl. 556. The opinion of the CFC on cross-motions for summary judgment is reported at 60 Fed. Cl. 230. The opinion of the CFC (Pet. App. 127a-154a) on the United States' motion for judgment on the pleadings or, in the alternative, for summary judgment is reported at 57 Fed. Cl. 182.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2006. A petition for rehearing was denied on November 30, 2006 (Pet. App. 155a-156a). The petition for a writ of certiorari was filed on February 26, 2007,

and was granted limited to Question 1 on May 29, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2501 of Title 28, United States Code, provides in pertinent part: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. 2501.

STATEMENT

Petitioner sued the United States, alleging that the government had physically taken petitioner's leasehold, without paying just compensation, during the remediation of a hazardous waste site pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* The CFC dismissed a portion of petitioner's complaint, holding that it was barred by the six-year statute of limitations contained in 28 U.S.C. 2501. Pet. App. 127a-154a. After a bench trial on liability with respect to the remainder of petitioner's complaint, the CFC entered judgment for the United States. *Id.* at 41a-126a. The court of appeals vacated and remanded with instructions to dismiss, holding that the CFC lacked jurisdiction over the entirety of petitioner's suit because petitioner's claims had accrued more than six years before the complaint was filed. *Id.* at 1a-40a.

1. In 1969, petitioner entered into a 50-year lease that granted it the exclusive right to mine marketable sand and gravel on a 158-acre parcel of land (Site) in Lapeer County, Michigan. Pet. App. 2a-3a. The leased Site wholly included a pre-existing landfill that operated from 1955 until 1980. *Id.* at 3a-4a, 42a-43a. While it was in operation, the landfill illegally accepted drums of liq-

uid industrial waste and twice caught fire. *Id.* at 4a; C.A. App. 1796-1799, 1994, 2005, 2014, 2320.

Petitioner and the landfill's operator entered into a cooperative arrangement under which the operator notified petitioner when it located "good" sand or gravel in the course of expanding the landfill. Pet. App. 66a. Petitioner, in turn, conducted its mining operations slightly ahead of the growing landfill, leaving empty space that could be filled with garbage. *Ibid.* On at least two occasions, petitioner's president observed trucks dumping barrels into the landfill. *Id.* at 67a-69a.

In 1984, the United States Environmental Protection Agency (EPA) put the landfill on the National Priorities List pursuant to CERCLA because of the large number of buried drums containing hazardous materials. Pet. App. 4a. Two years later, EPA decided on its initial remedy for excavating and removing the contaminated drums at the Site. *Ibid.* In 1990, EPA decided on a remedy for the groundwater contamination and capping of the landfill. *Id.* at 4a-5a. During the winter of 1992-1993, in connection with the 1990 decision, EPA erected a chain link fence that enclosed approximately 60% of the Site. *Id.* at 5a. In February 1994, EPA constructed a new internal security fence that "encompassed the overwhelming portion of [petitioner's] leasehold interest." *Id.* at 5a-6a. Over the following years, EPA repeatedly moved the fence as required for remedial operations. *Id.* at 6a-7a.

In May 1998, the fence was again realigned, enclosing the Area of Institutional Controls (AIC), an area designed to protect individuals from future exposures to hazardous materials and to ensure the integrity of the landfill cap system. Pet. App. 6a; C.A. App. 3106. The May 1998 fence remained in place throughout the con-

struction of the landfill cap. *Id.* at 1427. In December 2003, EPA moved the fence inward to enclose a smaller area, which currently comprises the AIC and includes the landfill cap system. Pet. App. 90a.

During the relevant period, petitioner repeatedly interfered with EPA's remediation activities at the Site. See Pet. App. 6a; C.A. App. 1499-1511, 3574-3582. In addition, from 1992-1994, petitioner's counsel wrote a series of letters asserting petitioner's property rights and entitlement to just compensation. Pet. App. 6a. As a result of continuing disputes between petitioner and EPA, EPA issued an administrative order in December 1996 requiring petitioner to cooperate with EPA and not to mine within the AIC. *Ibid.* Disputes nonetheless continued regarding petitioner's compliance with the administrative order. The United States eventually initiated proceedings in United States District Court and obtained an injunction preventing petitioner from interfering with EPA's remedial efforts. *Ibid.*

2. In May 2002, petitioner filed suit in the CFC, alleging a taking of its leasehold and seeking just compensation. Pet. App. 7a. Petitioner alleged "that the EPA's construction of the landfill cap, occupation of the AIC, construction of fences and access roads, and installation of groundwater monitoring wells amounted to a permanent physical taking." *Ibid.* The government moved for judgment on the pleadings or, in the alternative, for summary judgment. See *id.* at 127a. The government argued that petitioner's suit was barred by 28 U.S.C. 2501, which provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within

six years after such claim first accrues."[1] The United States contended that petitioner's claim had accrued during the winter of 1992-1993 when EPA had erected fences that precluded petitioner's access to portions of the property, and that the 2002 complaint was therefore untimely. Pet. App. 5a, 133a.

The CFC granted the government's motion in part and denied it in part. Pet. App. 127a-154a. The CFC concluded that petitioner's takings claim had accrued on the "date on which [petitioner's] property 'ha[d] been clearly and permanently taken,'" and that the government had "failed to demonstrate that it 'destroyed' [petitioner's] right to possess, use, or dispose of the [Site] or the [AIC] upon construction of fences in the winter of 1992-1993." *Id.* at 136a, 141a-142a (quoting *Hornback* v. *United States*, 52 Fed. Cl. 374, 377, aff'd, 55 Fed. Appx. 536 (Fed. Cir. 2002)). The CFC held, however, that petitioner's claim with respect to areas covered by permanently installed monitoring wells that had not been abandoned was time-barred. *Id.* at 143a.

The parties then filed cross-motions for summary judgment. The government argued that, under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), it had not taken any Fifth Amendment property interest of petitioner because petitioner's mining in the AIC was barred by pre-existing background principles of state

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[1] Section 2501 contains an exception to the six-year filing requirement for claims filed by "person[s] under legal disability or beyond the seas at the time the claim accrues." 28 U.S.C. 2501. In such cases, suit may be filed "within three years after the disability ceases." *Ibid.* That exception is not implicated here. Section 2501 also establishes special timing rules for claims under 28 U.S.C. 1497 and for suits for the fees of officers of the United States. Those rules are likewise inapplicable to this case.

nuisance and property law. The CFC "agreed with the government's contention that background principles of Michigan nuisance and property law limit the scope of compensable property interests in a physical takings case such as [petitioner's]," Pet. App. 9a, but it found the record as to the applicable "background principles" insufficient to grant the government's motion for summary judgment, see *id.* at 9a-10a.

Shortly before trial, the CFC ordered the parties to file briefs regarding the accrual date of petitioner's claim. Based on the evidentiary record that had been developed up to that point, the government took the position that petitioner's cause of action had accrued in May 1998. See J.A. 37a-39a.

The CFC then held a bench trial on liability. After that trial, the CFC entered judgment for the government. Pet. App. 41a-126a. The CFC concluded that petitioner's takings claim had accrued in May 1998, and that the claims that then remained were therefore timely. *Id.* at 50a-52a. The CFC held that petitioner was not entitled to compensation, however, because it had acquired its lease "[s]ubject to the [l]andfill," see *id.* at 63a, and had effectively consented to any restriction on its leasehold resulting from the landfill's operations, *id.* at 63a-73a. The CFC explained that petitioner's "contribution to the creation of a landfill containing a hazardous waste site makes the loss of a portion of [petitioner's] property during the remediation of that site a burden which it is fair to allow [petitioner] to bear, rather than shifting [petitioner's] loss to the public as a whole." *Id.* at 72a-73a. As an additional ground for its decision, the CFC also held that petitioner's mining was prohibited by background principles of state nuisance and property law. *Id.* at 73a-113a.

4. The court of appeals vacated and remanded with instructions to dismiss petitioner's complaint as untimely. Pet. App. 1a-40a.

a. Although the government did not argue in the court of appeals that petitioner's complaint was time-barred, an amicus curiae raised the issue, and petitioner addressed the timeliness of the complaint in its reply brief. See Pet. App. 13a-14a. The court of appeals held that it was required to address the timeliness of petitioner's complaint because 28 U.S.C. 2501 limits the jurisdiction of the CFC. See Pet. App. 15a-19a. The court acknowledged and distinguished recent decisions of this Court that have held other timing requirements to be non-jurisdictional in character. See *id.* at 17a-18a. The court explained that, "[i]n contrast to a non-jurisdictional claim-processing rule or the statute of limitations in [*Day* v. *McDonough*, 547 U.S. 198 (2006)], section 2501 sets forth a condition that must be met for a waiver of sovereign immunity in a suit for money damages against the United States." *Id.* at 17a-18a. The court also observed that

> the six-year statute of limitations of section 2501 enjoys a longstanding pedigree as a jurisdictional requirement. Since 1883 when the [Supreme] Court first held that the statute of limitations was jurisdictional in *Kendall v. United States*, 107 U.S. 123 (1883), the Court has consistently maintained that the time limit is jurisdictional and therefore cannot be waived.

Id. at 18a (citations omitted).

b. The court of appeals held that petitioner's claim accrued no later than February 1994 and that petitioner's complaint was therefore untimely. Pet. App.

23a-28a. The court stated that the fence EPA erected in 1994 "destroyed [petitioner's] right to exclude others from its leasehold" and "inhibited [petitioner's] right to use its property free of interference." *Id.* at 24a. The court further explained that the fence had remained on the Site from that time forward, even though the fence's precise location was changed from time to time. *Id.* at 24a-25a.

c. Judge Newman dissented. Pet. App. 33a-34a. She would have held that the limitations period established by Section 2501 "is not itself a matter of jurisdiction," *id.* at 33a, and that the timeliness of petitioner's complaint therefore "need not be considered *sua sponte*" when the government did not raise it on appeal, *id.* at 38a. Judge Newman further stated that she "would affirm the holding of the [CFC] that the limitations period had not accrued in 1994, and would reach the merits of the takings claim." *Id.* at 39a. On the merits, she would have affirmed the CFC's judgment on the ground that petitioner was not entitled to compensation because it was aware of the landfill when it acquired its leasehold. *Id.* at 40a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the six-year filing requirement established by Section 2501 is a nonwaivable jurisdictional limitation on the authority of the CFC to enter a money judgment against the United States.

A. Since 1863, when Congress first authorized the Court of Claims (now the CFC) to enter money judgments against the United States, the governing statute has always provided that a plaintiff's claim is "barred" if it is not asserted within six years after it accrues.

This Court has repeatedly stated that, unlike statutes of limitations governing suits between private parties, which are ordinarily deemed waived if defendants fail to invoke them in a timely fashion, the six-year filing requirement establishes a non-waivable jurisdictional limitation on the authority of the Court of Claims. Against the backdrop of those decisions, Congress has periodically refined, reenacted, and recodified the six-year filing requirement without evincing any intent to permit waiver of that requirement or otherwise to alter its jurisdictional character. This Court's settled construction of the statutory bar, and Congress's apparent concurrence in that construction, provide strong reasons to reject petitioner's argument here.

B. The result required by repeated decisions of this Court is reinforced by a number of sound reasons for construing Section 2501's six-year filing requirement as non-waivable and jurisdictional. That reading is consistent with the established principle that, in a suit against the United States, the terms of the government's consent define the jurisdiction of the court. It is also consistent with the history of the Court of Claims' creation as an Article I tribunal whose core function is to implement Congress's determinations regarding how federal funds should be expended. And unlike most statutes of limitations, which are tied to particular causes of actions or classes of claims and are potentially applicable in the courts of other sovereigns, Section 2501 by its terms governs proceedings (regardless of the cause of action asserted) only in federal court—and, indeed, only in a particular federal court.

C. Petitioner's reliance on the text of current Section 2501 is misplaced. Because the language of the current provision is not meaningfully different from prior ver-

sions of the six-year filing requirement, which this Court has consistently construed as non-waivable and jurisdictional, petitioner's textual argument provides no sound basis for departing from this Court's prior decisions. Section 2501 states, with narrow exceptions not relevant here, that "[e]very" claim filed in the CFC is barred if it is not asserted within six years after it accrues. Petitioner's reliance on a background understanding in other contexts that statutes of limitations are waivable is misplaced, since this Court's decisions have established a different background understanding of the statutory time limit for filing suit against the United States in the CFC for money damages.

D. Petitioner's reliance on the structure of Title 28 —and, in particular, on the fact that Section 2501 is codified in a different chapter of Title 28 from the one that contains the provisions (such as 28 U.S.C. 1491) that identify the substantive claims the CFC is authorized to hear—is misplaced. The 1948 Act that revised the Judicial Code expressly stated that no inference regarding the meaning of various provisions should be drawn from their placement within Title 28. The fact that Section 2501 is codified separately from other, indisputably jurisdictional provisions also does not distinguish it from its statutory predecessors, which this Court has construed as jurisdictional. Similarly in *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007), this Court construed the time limit for filing a notice of appeal in a federal civil case as jurisdictional, even though it is codified in a different chapter of Title 28 from the one that contains the provisions that in terms define the "jurisdiction" of the courts of appeals.

E. The more recent decisions of this Court on which petitioner relies do not undermine the Court's long-

standing construction of Section 2501 and its predecessors. Those recent decisions have held that, in certain instances or respects, time limits for filing suit against the United States should be applied in the same manner as comparable time limits in disputes between private parties. The Court has not overruled any of its precedents, however, nor has it addressed the specific question whether compliance with Section 2501's six-year filing requirement may be waived by the government. Even if the recent decisions on which petitioner relies are understood to establish a presumption that statutory time limits for suing the government are subject to waiver, that presumption is rebutted here, since this Court has repeatedly construed Section 2501 and its predecessors as non-waivable and jurisdictional, and Congress has acquiesced in that construction.

ARGUMENT

SECTION 2501's BAR TO CLAIMS FILED MORE THAN SIX YEARS AFTER THEIR ACCRUAL ESTABLISHES A NON-WAIVABLE JURISDICTIONAL LIMIT ON THE AUTHORITY OF THE COURT OF FEDERAL CLAIMS TO ENTER A MONEY JUDGMENT AGAINST THE UNITED STATES

The court of appeals held that petitioner's claim had accrued no later than February 1994. See Pet. App. 23a. Although petitioner sought review of that holding, this Court's grant of certiorari was limited to the question whether Section 2501 imposes a jurisdictional limit on the CFC's authority, and the accrual date of February 1994 must therefore be taken as given for purposes of the proceedings in this Court.[2] Petitioner's complaint

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[2] Despite this Court's denial of certiorari on the question of when petitioner's takings claim accrued, Amicus Curiae National Association

was filed in May 2002, more than six years after the date of accrual as determined by the court of appeals, and is

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of Home Builders (NAHB) asserts (Br. 3) that the claim did not become ripe until petitioner sought compensation under the Tucker Act, and that "the statute of limitations could not have run prior to the time the physical takings claim became ripe." *Ibid.* NAHB acknowledges the oddity of that result, *id.* at 3, 6, which, in its view, would mean that no statute of limitations would apply in a case such as this despite the explicit text of 28 U.S.C. 2501. NAHB nevertheless maintains that this result is compelled by *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985) (*Williamson County*), and it therefore asks the Court to reconsider its decision in *Williamson County*. See Amicus Br. 11-17.

The issue raised by NAHB is not fairly included in the question on which certiorari was granted, however, and it was neither presented to nor decided by the CFC or the Federal Circuit. In any event, the language in *Williamson County* on which NAHB relies simply makes clear that *equitable relief* against the United States to enjoin allegedly unconstitutional action—a taking of property without compensation—is not available if an action for just compensation may be brought under the Tucker Act. See 473 U.S. at 194-195 ("If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking.") (internal quotation marks, alterations, and citation omitted); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.") (footnote omitted). Where such a suit is available, any taking is not "without just compensation" and therefore is constitutional. By virtue of Section 2501, any such action to obtain compensation under the Tucker Act must be brought within six years of the alleged taking. Of course, if the plaintiff seeks compensation under the Tucker Act and loses on untimeliness grounds or on the merits of the takings issue (*e.g.*, based on a determination that there has been no taking that would trigger the Fifth Amendment's compensation condition), the plaintiff could not relitigate the takings issues in a subsequent suit for equitable relief.

therefore "barred" by Section 2501. Relying on a long line of this Court's precedents, see Pet. App. 18a-19a, the Federal Circuit correctly held that Section 2501 establishes a jurisdictional limit on the CFC's authority, and that dismissal of petitioner's suit was therefore required notwithstanding the government's failure to renew its timeliness challenge on appeal. The judgment of the court of appeals should be affirmed.

A. This Court Has Repeatedly Construed Section 2501 And Its Statutory Predecessors As Imposing A Non-Waivable Jurisdictional Restriction On The Authority Of The CFC

1. When Congress first established the Court of Claims in 1855, that court was not empowered to enter binding judgments. Rather, the court was authorized only to hear claims, to report its findings to Congress, and to provide a draft of a private bill in cases where the court's decision was favorable to the claimant. See Act of Feb. 24, 1855, ch. 122, § 7, 10 Stat. 613; *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983). In 1863, when Congress vested the Court of Claims with statutory authority to enter binding judgments, Congress also provided "[t]hat every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of th[e] act within six years after the claim first accrues." Act of Mar. 3, 1863 (1863 Act), ch. 92, § 10, 12 Stat. 767 (Rev. Stat. § 1069 (1878)). In holding that the 1863 Act did not violate the Seventh Amendment, this Court recognized the unique nature of suits against the United States. Noting that "[t]he government cannot be sued, except with its own consent," this Court held that the government "can declare in what court it may be

sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States." *McElrath* v. *United States*, 102 U.S. 426, 440 (1880).

Shortly thereafter, this Court reiterated that the government "may restrict the jurisdiction of the Court of Claims to certain classes of demands," and it recognized that Congress had enacted "restrictions which that court may not disregard." *Kendall* v. *United States*, 107 U.S. 123, 125 (1883). "For instance," the Court continued, "where it appears in the case that the claim is not one for which, consistently with the statute, a judgment can be given against the United States, it is the duty of the court to raise the question whether it is done by plea or not." *Ibid.* The Court explained that, under the 1863 Act, the class of cases in which judgment cannot be entered against the United States includes those "declared barred if not asserted within the time limited by the statute." *Ibid.* In answer to the question of what claims are barred, the Court stated: "*Every* claim—except those specially enumerated—is forever barred unless asserted within six years from the time it first accrued." *Ibid.* The Court therefore refused to add to the list of disabilities specified in the statute to which the six-year bar would not apply. *Ibid.*; see 1863 Act § 10, 12 Stat. 767; pp. 37-38 & n.11, *infra*.[3]

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[3] In *United States* v. *Lippitt*, 100 U.S. 663 (1879), this Court considered the application of Rev. Stat. § 1069 (1878) (the codification of the 1863 Act's six-year bar) to a claim that was first presented to the War Department and was thereafter transmitted by that Department to the Court of Claims pursuant to new statutory procedures enacted in 1868. See 100 U.S. at 666-667. The Court held that the six-year filing requirement was satisfied so long as the claim was presented to the

In *Finn* v. *United States*, 123 U.S. 227 (1887), this Court reaffirmed and expanded upon its prior conclusion that non-compliance with the six-year filing period specified in the 1863 Act must be noticed by the Court of Claims whether or not the government seeks dismissal on that ground:

> The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defence, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims.

Id. at 232-233. The Court explained that, when a suit was filed in the Court of Claims more than six years after the plaintiff's cause of action had accrued,

> [t]he duty of the court, * * * whether limitation was pleaded or not, was to dismiss the petition; for the statute, in our opinion, makes it a condition or

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War Department within six years after its accrual, regardless of the date on which it was transmitted by that Department to the Court of Claims. See *id.* at 668. The Court also stated that "[w]hether if a claim be presented at the proper department when six years has elapsed after it first accrued, the government is at liberty, upon its transfer therefrom to the Court of Claims, to plead the limitation of six years, or whether the court, in such cases, must itself interpose the statute for the protection of the government, are questions not necessary to be decided in this case." *Id.* at 669. The Court subsequently resolved those questions in *Finn* v. *United States*, 123 U.S. 227 (1887). See pp. 15-16 & note 4, *infra*.

> qualification of the right to a judgment against the United States that—except where the claimant labors under some one of the disabilities specified in the statute—the claim must be put in suit by the voluntary action of the claimant * * * within six years after suit could be commenced thereon against the Government.

Id. at 232.[4]

In 1887, Congress enacted the Tucker Act, ch. 359, 24 Stat. 505, which extended the jurisdiction of the Court of Claims to additional types of cases and granted the district courts concurrent jurisdiction in cases involving specified amounts in controversy. Section 1 of the Tucker Act stated that "the Court of Claims shall have jurisdiction to hear and determine the following matters: * * * *Provided*, That no suit against the Government of the United States[] shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is

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[4] Petitioner suggests (Br. 31) that the statements in *Finn* quoted in the text did not address the application of Section 2501's predecessor. That is incorrect. Although the claim in *Finn* was referred to the Court of Claims by the Secretary of the Treasury, see 123 U.S. at 228, the relevant time bar was imposed by Rev. Stat. § 1069 (1878), the codification of the 1863 Act's six-year bar. The Court explained that, in light of the claimant's non-compliance with the six-year filing requirement, "this claim belonged to the class which, under the express words of the act of 1863, Rev. Stat. § 1069 (1878), were 'forever barred,' so far, at least, as the claimant had the right to a judgment in that court against the United States." 123 U.S. at 232. By applying Rev. Stat. § 1069 (1878) to a claim that was transmitted to the Court of Claims by an Executive Branch agency, and by stating that the court in such a case was required to dismiss an untimely petition whether or not the government had raised the point, the Court in *Finn* resolved the questions left open in *Lippitt*, 100 U.S. at 669. See note 3, *supra*.

made." § 1, 24 Stat. 505. Thus, the Tucker Act imposed the same six-year filing requirement as did prior law, and the timing requirement was contained in the same section of the statute that conferred jurisdiction on the Court of Claims.[5]

After the Tucker Act's enactment, this Court continued to apply the time bar in the 1863 Act and to treat the six-year filing requirement as a non-waivable jurisdictional constraint on the Court of Claims' authority. Thus, in *de Arnaud* v. *United States*, 151 U.S. 483 (1894), the Court affirmed the dismissal of a claim that had accrued in 1862 but had not been submitted to the Treasury Department until 1886. See *id.* at 489, 492-495. The Court held that the claim was barred by the six-year filing requirement imposed by Rev. Stat. § 1069 (1878), and it quoted at length from its prior decision in *Finn*, explaining that the six-year bar applied whether the government had raised the point or not. See 151 U.S. at 495-496 (quoting *Finn*, 123 U.S. at 232-233); accord *United States* v. *New York*, 160 U.S. 598, 616-619 (1896). Similarly in *United States* v. *Wardwell*, 172 U.S. 48, 52 (1898), the Court reaffirmed that the six-year filing requirement imposed by Rev. Stat. § 1069 (1878) was "not merely a statute of limitations but also jurisdic-

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[5] The Tucker Act repealed "all laws and parts of laws inconsistent with th[e] act." § 16, 24 Stat. 508. In construing that provision, this Court explained that "repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible to both of them." *United States* v. *Greathouse*, 166 U.S. 601, 605 (1897). The Court held on that basis that, even though the Tucker Act itself did not include any exceptions to the six-year time limitation, the list of disabilities in the 1863 Act to which the six-year bar did not apply remained in force. *Id.* at 605-606.

tional in its nature, and limiting the cases of which the Court of Claims can take cognizance."

In 1911, Congress passed an act to codify, revise, and amend the laws relating to the judiciary. Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087 (1911 Act). In that statute, Congress maintained the requirement that "[e]very claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court * * * within six years after the claim first accrues." § 156, 36 Stat. 1139. The Senate Report accompanying the 1911 Act stated that the six-year filing requirement contained in the new enactment reflected "[e]xisting law" and that "no change whatever" was intended. S. Rep. No. 388, 61st Cong., 2d Sess. 61 (1910). In *Munro* v. *United States*, 303 U.S. 36 (1938), this Court dismissed as untimely a suit filed in district court, under a 1930 statute that incorporated Tucker Act procedures (see *id.* at 38 n.1), notwithstanding the fact that the government had failed in its answer to invoke the six-year bar imposed by the 1930 law. Citing *Finn*, the Court held that "[t]he District Attorney had no power to waive conditions or limitations imposed by statute in respect of suits against the United States." *Id.* at 41.

In 1948, Congress revised the Judicial Code, using the 1911 code as the source material. H.R. Rep. No. 308, 80th Cong., 1st Sess. 1 (1947). Section 2501 of the Act of June 25, 1948, provided: "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed * * * within six years after such claim first accrues." 62 Stat. 976. In construing Section 2501, the Court reaffirmed the jurisdictional character of the six-year filing requirement. Thus, in

Soriano v. *United States*, 352 U.S. 270 (1957), the Court explained:

> It has been settled since *Kendall* v. *United States*, 107 U.S. 123 (1883), that the Congress in creating the Court of Claims restricted that court's jurisdiction. In *Kendall* this Court held that the Congress in the Act creating the Court of Claims gave the Government's consent to be sued therein only in certain classes of claims and that no others might be asserted against it, including "claims which are declared barred if not asserted within the time limited by the statute." *Id.*, at 125. As to the latter cases, jurisdiction was given only over those filed "within six years after such claim *first* accrues," unless the claimant was "under legal disability or beyond the seas at the time the claim accrues," in which event suit must "be filed within three years after the disability ceases." 62 Stat. 976, 28 U.S.C. § 2501.

Id. at 273.

2. Thus, over an extended period of time beginning more than 125 years ago, this Court has repeatedly described the six-year filing requirement contained in Section 2501 and its statutory predecessors as a "jurisdictional" limit on the authority of the Court of Claims (now the CFC), and has repeatedly stated that the Court of Claims is required to dismiss an untimely complaint even if the government does not seek dismissal on that ground. "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court] ha[s] done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989).

The fact that Congress has periodically recodified the relevant statutory provision, and has refined its language in other respects without evincing any intent to permit waiver of the six-year filing requirement or otherwise to alter its jurisdictional character, provides a further reason to adhere to this Court's prior construction of the law. Compare, *e.g.*, *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 176, 179-180 (2005); *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-699 (1979); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

In *Cannon*, the Court applied that interpretive principle to a federal statute enacted in 1972, shortly after this Court had issued a series of decisions recognizing implied private rights of action under various federal laws. See 441 U.S. at 698 & nn.22-23. While acknowledging that its intervening decision in *Cort* v. *Ash*, 422 U.S. 66 (1975), had announced a more restrictive view of the circumstances under which a private right of action may be inferred, the Court in *Cannon* noted that its "evaluation of congressional action in 1972 must take into account its contemporary legal context." 441 U.S. at 698-699. Here, the pattern of this Court's decisions is longer and more consistent than in *Cannon*, and thus it would be particularly anachronistic to construe current Section 2501 solely by reference to recent decisions involving different statutory regimes. The inquiry must be based on the legal context, including most significantly this Court's repeated pronouncements concerning the non-waivable and jurisdictional character of Section 2501 and its predecessors, in which Congress has refined, reenacted, and recodified the longstanding statutory directive that suits in the Court of Claims (or the

CFC) are "barred" if not filed within six years after the plaintiff's claim accrues.

3. Petitioner dismisses the above-quoted language from *Kendall* and its progeny (see pp. 14-19, *supra*) as "[u]nfortunate dicta." Pet. Br. 30; see *id.* at 30-32. This Court's early discussions of Section 2501's statutory predecessors, however, did not reflect the "less than meticulous" use of the term "jurisdiction" that the Court's more recent opinions have warned against. *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004); see *Eberhart* v. *United States*, 546 U.S. 12, 16 (2005) (per curiam). To the contrary, the Court in those early cases squarely confronted, and unequivocally endorsed, the most significant consequence of viewing the six-year filing deadline as "jurisdictional"—*viz.*, that the Court of Claims and this Court were precluded from awarding relief on an untimely claim even if the government did not seek dismissal on that ground. See *Kendall*, 107 U.S. at 125; *Finn*, 123 U.S. at 232-233; *de Arnaud*, 151 U.S. at 495-496.[6]

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[6] In arguing (Br. 31) that "the supposed jurisdictional edifice for the predecessor statute to § 2501 was grounded on dicta," petitioner relies in part on the fact that, in prior cases involving the 1863 Act, the government in fact raised the six-year bar as a ground for dismissal. The Court's evident intent in discussing the non-waivable, jurisdictional character of Section 2501's predecessors, however, and in contrasting that bar with waivable limitations period in suits between private parties, was to provide guidance to litigants and to the Court of Claims concerning the proper conduct of litigation in that court. In refining the applicable jurisdictional scheme, Congress was entitled to rely on this Court's repeated pronouncements that the Court of Claims was required to notice the six-year bar, and was disabled from awarding a money judgment on an untimely claim, even if the government did not seek dismissal on that ground. Congress should not be required to parse this Court's opinions to discern possible alternative grounds for

There is also no basis for petitioner's contention (Br. 30) that this Court, in construing Section 2501's predecessors, "neglected the ubiquitous legal understanding of a statute of limitations as a waivable affirmative defense." To the contrary, the Court acknowledged that general principle but found it to be inapplicable to the specific statutory provisions that defined the authority of the Court of Claims. Thus, in *Finn*, this Court noted "[t]he general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions." 123 U.S. at 232-233. The Court explained, however, that that rule "has no application to suits in the Court of Claims against the United States" because "the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims." *Id.* at 233; see *de Arnaud*, 151 U.S. at 495-496 (quoting *Finn*, 123 U.S. at 233); *United States* v. *New York*, 160 U.S. at 617 (same); p. 15, *supra*. This Court's conscious treatment of Section 2501's predecessor as an exception to the usual rule that limitations periods establish waivable defenses cannot reasonably be impugned as "neglect[ing]" the general rule.

B. There Are Sound Reasons For Treating Section 2501 As An Exception To The General Rule That Limitations Periods For Commencing Suit Are Non-Jurisdictional

As explained above, the substantial body of this Court's precedents is by itself a sufficient basis for rejecting petitioner's reliance on the general rule that

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the Court's judgments before treating the Court's considered explication of existing law as authoritative.

statutes of limitations are non-jurisdictional. In addition, however, there are sound bases for construing the six-year filing requirement in Section 2501 as a non-waivable jurisdictional limit on the CFC's authority to enter money judgments against the United States.

1. As this Court has repeatedly recognized, "[t]he basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983); see *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *Mitchell*, 463 U.S. at 212; *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994). Thus, "the existence of consent [to be sued] is a prerequisite for jurisdiction," *Mitchell*, 463 U.S. at 212, and "the terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit," *Sherwood*, 312 U.S. at 586. "A statute of limitations requiring that a suit against the Government be brought within a certain time period is one of those terms." *United States* v. *Dalm*, 494 U.S. 596, 608 (1990); see *Block*, 461 U.S. at 287 ("When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity."); accord *United States* v. *Mottaz*, 476 U.S. 834, 843 (1986) ("The limitations period is a central condition of the consent given by the Act.").

As the Court explained in *Dalm*, a plaintiff who files suit against the United States after the prescribed statutory period has elapsed effectively "asks [the court] to go beyond the authority Congress has given [it] in permitting suits against the Government." 494 U.S. at 610. This Court's uniform treatment of the applicable six-year filing requirement as a limitation on the Court of

Claims' *power* is thus consistent with established principles of sovereign immunity.[7]

2. When Congress first established the Court of Claims in 1855, the court did not have authority to enter binding judgments. Rather, "[t]he 1855 Act empowered that court to hear claims and report its findings to Congress and to submit a draft of a private bill in each case which received a favorable decision." *Mitchell*, 463 U.S. at 213; see p. 13, *supra*. The Court of Claims thus initially performed an advisory function, providing recommendations to Congress with respect to the proper disposition of requests for private bills.

After "[t]he limited powers initially conferred upon the [Court of Claims] failed to relieve Congress from the

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[7] Petitioner contends (Br. 43) that the interpretive principles that generally govern waivers of sovereign immunity are inapplicable here because the Constitution itself confers a right to monetary compensation for a taking of property by the United States. The Fifth Amendment's Just Compensation Clause, however, does not itself override the United States' sovereign immunity from suits for damages to be paid out of the federal treasury. That immunity can be waived only by Act of Congress. See *Lynch* v. *United States*, 292 U.S. 571, 581-582 (1934); U.S. Const. Art. I, § 9, Cl. 7. In any event, neither the text nor the history of Section 2501 suggests that its character as jurisdictional or nonjurisdictional could vary from case to case depending on the substantive claim asserted. Cf. *Clark* v. *Martinez*, 543 U.S. 371, 380-385 (2005). And even assuming, arguendo, that Congress is constitutionally required to provide a compensation mechanism for takings claims, Congress has broad discretion to fashion an appropriate jurisdictional and procedural scheme for the resolution of such suits. Petitioner does not and could not reasonably contend, for example, that it can pursue its takings claim in the district court rather than in the CFC. Nor could treatment of Section 2501's six-year filing requirement as a jurisdictional limit on the CFC's authority reasonably be thought to place an unconstitutional burden on petitioner's asserted Fifth Amendment right to just compensation.

laborious necessity of examining the merits of private bills," Congress amended the statutory scheme to vest the court with authority to enter binding judgments. *Mitchell*, 463 U.S. at 213 (citation and internal quotation marks omitted). Congress conferred that authority, however, subject to specific conditions set by statute, including the requirement that a claim be filed within six years of its first accrual. The CFC is an Article I court, see 28 U.S.C. 171(a), and, as a matter of both history and current practice, its core function is to implement Congress's determinations as to how federal funds will be spent. See U.S. Const. Art. I, § 8, Cl. 1 ("The Congress shall have Power * * * to pay the Debts * * * of the United States."); *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 397-401 (1980).

Congress's refusal to authorize the CFC to enter binding judgments on untimely claims, even where Executive Branch officials do not rely on the six-year bar, is simply one means by which Congress has sought to maintain adequate control over the public fisc. See *Finn*, 123 U.S. at 233 (explaining that "the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims"). Indeed, the Appropriations Clause of the Constitution provides that no money may be paid out of the Treasury except as authorized by statute. U.S. Const. Art. I, § 9, Cl. 7. This Court has held that the Appropriations Clause prohibits reliance on principles of estoppel to require payments from the Treasury, based on the statements of government employees, when an Act of Congress does not authorize the payments. See *OPM* v. *Richmond*, 496 U.S. 414, 426-432 (1990). Similarly here, this Court's decisions establish

that the CFC has no authority to adjudicate a claim for money where Section 2501 bars the claim because of the six-year filing requirement, even if an individual government employee has failed to invoke the requirement as a basis for dismissal.[8]

3. Statutes of limitations are often applied by courts other than those of the sovereign that is responsible for the limitations period's enactment. Thus, a federal court sitting in diversity must apply the state limitations period that would govern if the suit were heard in state court, rather than a limitations period drawn from federal law. *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 107-110 (1945); see *Jinks* v. *Richland County*, 538 U.S. 456, 465 (2003); *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 726-727 (1988). Indeed, for most of our Nation's history,

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[8] As an additional protection for the federal fisc, Section 6 of the Tucker Act provided that, "should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; *but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.*" 24 Stat. 506 (emphasis added). Like the non-waivable six-year filing requirement contained in the Tucker Act and in the 1863 Act before it, that provision reflected Congress's unwillingness to allow individual federal attorneys to acquiesce in the payment of claims for which Congress had declined to waive the government's immunity. The substance of that provision remained in Title 28 until it was omitted by the 1948 Judicial Code revision. See 28 U.S.C. 763 (1946); *Munro*, 303 U.S. at 39 n.1. The House Report accompanying the 1948 revision explained that Section 763 was omitted because it had been superseded by, *inter alia*, Federal Rule of Civil Procedure 55(e). See H.R. Rep. No. 308, *supra*, at A239. Rule 55(e) continues to provide that "[n]o judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court." Fed. R. Civ. P. 55(e); see also Fed. Cl. R. 55(b).

state statutes of limitations were understood to apply of their own force (unless preempted by an inconsistent federal limitations period) even to federal causes of action adjudicated in federal court. See *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 159-162 (1987) (Scalia, J., concurring in the judgment). Conversely, when Congress establishes a limitations period for a federal cause of action, that period governs even if the federal claim is tried in state court. See, *e.g.*, *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 225 (1958); *Engel* v. *Davenport*, 271 U.S. 33, 39 (1926). In light of those potential applications, general treatment of limitations periods as jurisdictional would be anomalous, since one sovereign would not ordinarily assert the authority to regulate the jurisdiction of another sovereign's courts.

Section 2501 and its statutory predecessors, by contrast, have not been linked to particular substantive claims or to claims that might be brought in state court as well as federal court. Those provisions have instead governed proceedings that can be brought only against the United States and only in federal court—indeed, in a particular federal court. Section 2501 is therefore far more naturally characterized as jurisdictional than is a limitations period that has potential application in the courts of multiple sovereigns.

Just last Term, this Court observed that, as a general matter, "[j]urisdictional treatment of statutory time limits makes good sense." *Bowles* v. *Russell*, 127 S. Ct. 2360, 2365 (2007). The Court explained that, "[b]ecause Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Ibid.* It noted as well that "the notion of subject-matter jurisdiction

obviously extends to classes of cases falling within a court's adjudicatory authority." *Ibid.* (ellipsis, internal quotation marks, and citation omitted). An appeal of an adverse federal-court judgment generally can be brought only to a single federal court. Time limits on appeals, like Section 2501 but unlike most statutes of limitations, therefore are readily construed as limitations on the jurisdiction of that single court, rather than as defenses that could be raised in state or federal court.[9]

The typical federal statute of limitations, which is not tied to a particular court and may apply in state judicial proceedings, is not naturally characterized as a limitation on the adjudicatory power of the court. The six-year filing requirement contained in Section 2501 and its predecessors, by contrast, has consistently been understood as a limitation on the class of suits against the United States that the Court of Claims (now CFC) may entertain. See, *e.g.*, *Wardwell*, 172 U.S. at 52 (describ-

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[9] A central tenet of our legal system is that a federal court should take special care to avoid deciding the merits of a case that Congress has not authorized it to adjudicate. The unauthorized exercise of jurisdiction is thus regarded as an error different in kind from a misapplication of law in the resolution of a case that the court *is* authorized to decide. See, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101-102 (1998) ("For a court to pronounce upon the meaning or constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."); *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 583 (1999). If excusing a party's noncompliance with a particular rule would place the court in the position of adjudicating a case that Congress did not authorize it to adjudicate, the rule is properly characterized as jurisdictional. Section 2501 establishes such a rule because it is a *statutory* provision that addresses the question whether the CFC may adjudicate a case against the Untied States *at all*.

ing the six-year time bar in the 1863 Act as "limiting the cases of which the Court of Claims can take cognizance"); *Kendall*, 107 U.S. at 125 (explaining that Congress "may restrict the jurisdiction of the Court of Claims to certain classes of demands," and that the six-year filing requirement is one of the statutory "restrictions which that court may not disregard").

C. The Text Of Current 28 U.S.C. 2501 Provides No Sound Basis For Departing From This Court's Consistent Holdings That Section 2501 And Its Predecessors Establish A Non-Waivable Jurisdictional Limit On The CFC's Authority

In its current form, 28 U.S.C. 2501 states that "[e]very claim of which the [CFC] has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." Petitioner contends that the "plain and unambiguous language" of current Section 2501 precludes treatment of the six-year filing requirement as a jurisdictional limit, because the wording of that provision assumes that even an untimely claim is a "claim of which the [CFC] *has jurisdiction*." Pet. Br. 13 (quoting 28 U.S.C. 2501); see *id.* at 13-18. That argument provides no sound basis for this Court to depart from its prior decisions treating Section 2501 and its predecessors as jurisdictional in character.

1. For purposes of the question presented here, the wording of current Section 2501 is not meaningfully different from the wording of the original version established by the 1863 Act. The 1863 Act provided "[t]hat every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition * * * be filed * * * within six years after the claim first accrues." § 10, 12 Stat. 767 (Rev. Stat. § 1069

(1878)); see p. 13, *supra*. The word "cognizable" "ordinarily means '[c]apable of being tried or examined before a designated tribunal; within [the] jurisdiction of [a] court or power given to [a] court to adjudicate [a] controversy.'" *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994) (quoting *Black's Law Dictionary* 259 (6th ed. 1990))). As used in the 1863 Act, the word "cognizable" was understood by this Court to refer to the classes of substantive claims that the Court of Claims was *potentially* empowered to adjudicate, provided that other jurisdictional prerequisites were satisfied in a particular case. The Court in *Finn* concluded that, because of the plaintiff's non-compliance with the six-year filing requirement, "the claim here in suit—although by reason of its character 'cognizable by the Court of Claims'—cannot properly be made the basis of a judgment in that court," and that "[t]he duty of the court, * * * whether limitation was pleaded or not, was to dismiss the petition." 123 U.S. at 231-232 (quoting 1863 Act § 10, 12 Stat. 767).

Thus, the Court in *Finn* saw no contradiction between its recognition that the plaintiff's claim, by its character, was "cognizable by the Court of Claims," and its conclusion that the six-year filing requirement in the 1863 Act constituted a non-waivable restriction on the Court of Claims' adjudicatory power. Similarly under the current version of the provision, the fact that petitioner's claim, by its character, is one "of which the [CFC] has jurisdiction," in the sense that the substantive claim is encompassed by an affirmative grant of jurisdiction to the CFC (28 U.S.C. 1491), does not negate the fact that Section 2501 continues to impose an *additional* non-waivable prerequisite to the CFC's authority to enter a money judgment against the United States. That inference is reinforced by the fact that the clause

"of which the [court] has jurisdiction" was first inserted by the 1948 Judicial Code revision. This Court has repeatedly recognized that "no change in law should be presumed from the 1948 revision of the Judicial Code 'unless an intent to make such changes is clearly expressed.'" *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 831 n.4 (1989) (quoting *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957)); accord, *e.g.*, *Keene Corp.* v. *United States*, 508 U.S. 200, 209 (1993) (citing cases). Congress's substitution of the clause "of which the [CFC] has jurisdiction" for the prior synonymous phrase "cognizable by the court of claims" does not constitute the requisite clear expression of an intent to alter the provision's meaning, which had been fixed by a line of this Court's precedents.

Nor does the history of the 1948 Judicial Code revision suggest any intent to alter the established jurisdictional character of Section 2501's predecessors. The Chief Reviewer of the 1948 revision explained that, because the task necessarily involved the consolidation, simplification, and clarification of numerous enactments, "no changes of law or policy w[ere to] be presumed from changes of language in revision unless an intent to make such changes is clearly expressed. Mere changes in phraseology indicate no intent to work a change of meaning." William W. Barron, *The Judicial Code 1948 Revision*, 8 F.R.D. 439, 445-446 (1948). To that end, the Reviser's Notes to each section of the 1948 act "noted all instances where change [wa]s intended and the reason therefor." *Id.* at 446; see H.R. Rep. No. 308, *supra*, at A1. The Reviser's Notes to Section 2501 express no intent to supersede this Court's prior holdings as to the jurisdictional and non-waivable nature of the six-year time bar. See *id.* at A192. Consistent with the fact that

the current language of Section 2501 is synonymous with the text of former Rev. Stat. § 1069 (1878), and with the extrinsic evidence indicating that no substantive change was intended, this Court in *Soriano* reaffirmed the jurisdictional nature of Section 2501 even after the 1948 enactment. See 352 U.S. at 271.

2. Although petitioner purports to rely on the "plain and unambiguous language" of Section 2501 (Br. 13), nothing in the text of that provision suggests that the six-year filing requirement is waivable. To the contrary, Section 2501 states, with limited exceptions not relevant here, that "*[e]very claim* of which the [CFC] has jurisdiction *shall be barred* unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. 2501 (emphases added). On its face, the statute categorically requires dismissal of claims filed more than six years after accrual (except for claims filed by "a person under legal disability or beyond the seas at the time the claim accrues," which are separately addressed in the third sentence of Section 2501, see note 1, *supra*), and it does not explicitly recognize any exception for suits in which the government fails to raise or preserve a challenge to the timeliness of the complaint.

Petitioner's core contention in this case—*i.e.*, that the court of appeals erred in considering the timeliness of its complaint after the government did not raise on appeal the argument that the complaint was filed more than six years after the claim's accrual—is not based on any language within the four corners of Section 2501 or its predecessors. Rather, petitioner's argument rests on background understandings of the manner in which statutes of limitations *generally* operate, and on Congress's assumed familiarity with those understandings. Thus, petitioner explains that limitations periods have histori-

cally been viewed as "non-jurisdictional and waivable," and argues that "[c]ongressional intent with respect to a statutory provision should be interpreted in light of the contemporary legal context." Br. 28; see *id.* at 28-29.

Petitioner is correct that this Court, in construing Section 2501's current language, should assume that the enacting Congress was familiar with the Court's prior decisions and with the existing legal landscape. See pp. 19-20, *supra*. Petitioner's own application of that principle, however, is unduly selective. While petitioner would impute to Congress an awareness of precedents holding that statutes of limitations *generally* establish waivable defenses, petitioner attaches no significance to the fact that Congress has refined, reenacted, and recodified Section 2501 and its predecessors against the backdrop of this Court's repeated pronouncements that the *specific* time limit at issue here—the six-year filing period for commencing suit against the United States in the Court of Claims (now the CFC)—*is not* subject to the general rule and *is* non-waivable and jurisdictional. There is no warrant for petitioner's approach. Both the plain text of Section 2501 standing alone, and the most directly relevant background principles and "legal context" (Pet. Br. 28), indicate that Section 2501's bar to claims filed more than six years after accrual is not subject to an exception for cases in which the government fails to preserve a timeliness objection.

D. Petitioner's Reliance On The Structure Of Title 28 Is Misplaced

Petitioner argues (Br. 19-24) that Section 2501 cannot properly be regarded as a jurisdictional limit on the CFC's authority because it is currently codified in a part

of Title 28 (Chapter 165) that is entitled "United States Court of Federal Claims Procedure" and that is separate from the indisputably jurisdictional provisions (most notably 28 U.S.C. 1491) that identify the substantive claims that the CFC is authorized to hear. Petitioner's reliance on the structure of Title 28 is misplaced.

1. As petitioner acknowledges (Br. 20), the 1948 Act that revised the Judicial Code expressly stated that "[n]o inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, as set out in section 1 of this Act, in which any section is placed, nor by reason of the catchlines used in such title." Act of June 25, 1948, ch. 646, § 33, 62 Stat. 991. The *text* of the statute that effected the recodification of Title 28 thus forbids precisely the inference that petitioner asks this Court to draw. At the very most, the structure of Title 28 might suggest that the *revisers* did not understand the preexisting six-year filing requirement to be a limit on the Court of Claims' jurisdiction. If that is so, however, the revisers' view of preexisting law is entitled to no weight because it is manifestly contrary to the construction of Section 2501's predecessors reflected in this Court's pre-1948 decisions, which had consistently described the six-year filing requirement as a non-waivable jurisdictional rule.

2. Both in the 1863 Act and in its initial codification in Rev. Stat. § 1069 (1878), the six-year filing requirement was located in a separate section from the statutory provisions that specified the classes of substantive claims that the Court of Claims was authorized to adjudicate. See 1863 Act §§ 2, 3, 10, 12 Stat. 765, 767 (Rev. Stat. §§ 1059, 1060, 1069 (1878)). Neither the 1863 Act nor Rev. Stat. § 1069 (1878), moreover, explicitly described the six-year filing requirement as a limitation on

the Court of Claims' "jurisdiction." The structural features of current Title 28 on which petitioner relies thus do not meaningfully distinguish present law from the predecessor versions that this Court has repeatedly construed as non-waivable and jurisdictional. Petitioner's structural argument therefore provides no sound basis for this Court to revisit its prior holdings.[10]

3. Petitioner's structural argument is also inconsistent with this Court's recent decision in *Bowles*, which held that the timely filing of a notice of appeal in a federal civil case is a statutory prerequisite to the court of appeals' exercise of jurisdiction. See 127 S. Ct. at 2363-2366. The statutory provision at issue in *Bowles* (28 U.S.C. 2107(a)) does not contain the word "jurisdiction," and it is codified in a different chapter of Title 28 (Chapter 133, 28 U.S.C. 2101-2113) than are the provisions that in terms define the "jurisdiction" of the courts of appeals with respect to the types of cases they may hear (Chapter 83, 28 U.S.C. 1291-1296). In holding that Section 2107(a) nevertheless establishes a jurisdictional requirement, the Court noted its prior statement that "some time limits are jurisdictional even though ex-

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[10] As enacted in 1887, the Tucker Act's six-year filing requirement was contained within the same section that granted jurisdiction to the Court of Claims over specified classes of suits. § 1, 24 Stat. 505 ("[T]he Court of Claims shall have jurisdiction to hear and determine the following matters[] * * * *[p]rovided*, [t]hat no suit against the Government of the United States[] shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made."). Under the 1911 recodification of the Judicial Code, the two provisions were separated (as they had been under the 1863 Act and the Revised Statutes). See 1911 Act §§ 145, 156, 36 Stat. 1136, 1139. None of this Court's decisions have suggested that the waivability of the time bar turned on its placement relative to the applicable statutes' affirmative grants of jurisdiction.

pressed in a separate statutory section from jurisdictional grants." *Bowles*, 127 S. Ct. at 2364 (quoting *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003)). Petitioner's structural argument cannot be reconciled with the analysis and result in *Bowles*.

E. This Court's Decisions Construing The Six-Year Filing Requirement As A Jurisdictional Limit On The Authority Of The Court of Claims Remain Good Law

Petitioner contends (Br. 33-37) that the longstanding precedents discussed above (see pp. 14-19, *supra*), which have construed the six-year filing requirement contained in Section 2501 and its predecessors as a non-waivable jurisdictional limit on the authority of the Court of Claims (now the CFC), have been superseded by this Court's more recent decisions. Petitioner views those more recent decisions as establishing a strong presumption that statutory time periods for filing suit against the government should in all respects be construed in the same way as analogous time periods governing disputes between private parties. Petitioner's reliance on those rulings is misplaced.

1. In *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court considered a statutory provision that required the plaintiff in an employment-discrimination suit against the federal government to file his complaint within 30 days of receipt of notice of final action taken by the Equal Employment Opportunity Commission. See *id.* at 92. While recognizing that the 30-day filing requirement was "a condition to the waiver of sovereign immunity and thus must be strictly construed," *id.* at 94, this Court concluded that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to

suits against the United States," *id.* at 95-96. The Court stated that "[s]uch a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Id.* at 95.

This Court's decision in *Irwin* does not speak directly to the question presented here. The Court characterized its decision as adopting a "general rule to govern the applicability of equitable tolling in suits against the Government." 498 U.S. at 95. The Court did not purport to resolve other issues concerning the application of statutory time limits in suits against the government, and it did not discuss the question whether such limits are jurisdictional in nature.

Petitioner argues that, because courts are not authorized to fashion equitable exceptions to jurisdictional limits, the Court's endorsement of equitable tolling in *Irwin* necessarily (albeit implicitly) indicates that the time limit at issue there was non-jurisdictional. See Pet. Br. 36 (citing *Bowles*, 127 S. Ct. at 2366). Petitioner's effort to link the two concepts does not bolster its argument with respect to Section 2501, however, because this Court in *Kendall* squarely held that Section 2501's statutory predecessor was *not* subject to equitable tolling. That holding is an insuperable obstacle to petitioner's effort to draw support from *Irwin*.

The plaintiff in *Kendall* contended that the six-year period for filing suit under the 1863 Act should have been tolled during an interval when, by reason of his prior service to the Confederate government, he was disabled from swearing an oath that was a statutory prerequisite to filing suit in the Court of Claims. See 107 U.S. at 124-125. This Court rejected that argument, holding that the tolling provisions of the 1863 Act were exclusive, and that the Court could not "superadd to

those enumerated, a disability arising from the claimant's inability to truthfully take the required oath." *Id.* at 125. The Court noted that it could no more recognize an additional basis for tolling for the claimant in that case than it could for a "disability arising from sickness, surprise, or inevitable accident, which might prevent a claimant from suing within the time prescribed." *Ibid.* Accord *Soriano*, 352 U.S. at 273-274 (quoting the same language from *Kendall*).[11]

In *Irwin*, the Court concluded that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96.[12]

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[11] The 1863 Act stated:

> [T]he claims of married women first accrued during marriage, of persons under the age of twenty-one years first accruing during minority, and of idiots, lunatics, insane persons, and persons beyond seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

§ 10, 12 Stat. 767. Section 2501 in its current form provides that "[a] petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases." 28 U.S.C. 2501; see note 1, *supra*.

[12] After announcing a rebuttable presumption that limitations periods in suits against the government are subject to equitable tolling, the Court in *Irwin* observed that "Congress, of course, may provide otherwise if it wishes to do so." 498 U.S. at 96. In its subsequent decisions in *United States* v. *Brockamp*, 519 U.S. 347, 350-354 (1997), and *United States* v. *Beggerly*, 524 U.S. 38, 48-49 (1998), the Court has construed particular federal statutes as precluding equitable tolling other than as specified on the face of the statute. As explained in the text, when *Irwin* was decided, this Court in *Soriano* and *Kendall* had

Even assuming that *Irwin* implicitly suggests a similar "rebuttable presumption" that limitations periods in suits against the United States are non-jurisdictional, that presumption is rebutted here—both by this Court's holdings in *Soriano* and *Kendall* specifically concerning Section 2501 and its predecessor, and by the Court's reasoning in those cases, which relied on the provision for tolling the limitations period in the case of certain disabilities as foreclosing tolling for other reasons. The fact that Congress has repeatedly refined Section 2501 and its predecessors without disturbing this Court's understanding of the six-year filing requirement as non-waivable and jurisdictional, and without disturbing the Court's rejection of equitable tolling under those provisions except where expressly provided, confirms that conclusion.[13]

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already construed Section 2501 and its predecessor not to allow equitable tolling.

[13] As petitioner observes (Br. 33-34), the Court in *Irwin* expressed the view that statutory text such as that contained in Section 2501's *first* sentence does not by itself manifest a sufficiently clear intent to preclude equitable tolling so as to rebut the presumption that tolling would be permitted. But the Court in *Irwin* did not discuss the *third* sentence of that provision, on which the Court in *Kendall* and *Soriano* had also relied, and it did not announce the overruling of any of its precedents—a step that would have been necessary for the Court to hold either that the six-year filing requirement in Section 2501 could be tolled for reasons other than those specified or (in this case) that the untimeliness of a complaint filed in the CFC may be overlooked if the government fails to raise the point. But cf. *Irwin*, 498 U.S. at 98 (White, J., concurring in part and concurring in the judgment) (expressing the view that the Court had overruled *Soriano*). Petitioner's reliance on the *Irwin* Court's discussion of Section 2501 is in substantial tension with petitioner's effort (Br. 30) to dismiss as "[u]nfortunate dicta" this Court's repeated and considered statements that the six-year filing requirement for suits in the Court of Claims is

2. Petitioner's reliance (Pet. 12-13) on *Franconia Associates* v. *United States*, 536 U.S. 129 (2002), is also misplaced. The Court in *Franconia Associates* rejected the contention "that § 2501 creates a special accrual rule for suits against the United States." 536 U.S. at 145. Rather, the Court held, the determination of when a claim against the government "first accrues" within the meaning of Section 2501 is governed by the same accrual principles that would apply in a like suit between private parties. See *ibid.* But while the Court in *Franconia Associates* expressed the view that "limitations periods should *generally* apply to the Government 'in the same way that' they apply to private parties," *ibid.* (emphasis added) (quoting *Irwin*, 498 U.S. at 95), it did not announce a categorical rule to that effect, and it had no occasion to decide whether the statutory bar to an untimely claim may be waived if the government fails to assert it. Nor did the *Franconia* Court's construction of the term "first accrues" require the overruling of any of this Court's precedents.[14]

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non-waivable and jurisdictional. The suit in *Irwin* was not filed in the CFC, and Section 2501 was therefore inapplicable to the case. Indeed, the Court's determination that equitable tolling is presumptively available in suits against the government was ultimately unnecessary to the disposition even of *Irwin* itself, since the Court concluded that Irwin himself did not satisfy the criteria for tolling. See 498 U.S. at 96.

[14] Petitioner's reliance (Br. 35) on *Bowen* v. *City of New York*, 476 U.S. 467 (1986), is also misplaced. The Court in *City of New York* held that the 60-day limit for challenging benefit determinations under the Social Security Act, see 42 U.S.C. 405(g) (1982), was waivable and non-jurisdictional. See 476 U.S. at 478 & n.10. The Court limited its holding to Section 405(g), however, and did not announce any general rule or presumption concerning the waivability of other statutory time limits for commencing suit against the government. The Court also observed that Section 405(g) by its terms allows the plaintiff to "seek judicial

3. Petitioner's reliance (Br. 35) on *Scarborough* v. *Principi*, 541 U.S. 401 (2004), is also misplaced. The timing requirement at issue there, see *id.* at 405 (construing statutory provision governing timing and content of application for attorneys' fees by prevailing party in suit against the United States), did not pertain to the initiation of a lawsuit, but instead governed a subsidiary determination made by federal courts in cases that they were indisputably authorized to decide. As the Court in *Bowles* explained, *Scarborough* "concerned 'a mode of relief . . . ancillary to the judgment of a court' that already had plenary jurisdiction." 127 S. Ct. at 2365 (quoting *Scarborough*, 541 U.S. at 413). Because Section 2501 speaks to the question whether the CFC may adjudicate petitioner's claim at all, it is much more naturally characterized as a jurisdictional rule. See note 9, *supra*.[15]

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review within 60 days of the Secretary's final decision or 'within such further time as the Secretary may allow.'" *Id.* at 476 (quoting 28 U.S.C. 405(g) (1982)). Section 2501 of Title 28 contains no comparable language authorizing Executive Branch officials to extend the filing period.

[15] Petitioner contends (Br. 47-48) that, if the six-year limitations period prescribed by Section 2501 is not jurisdictional, the court of appeals was *precluded* from inquiring into the timeliness of petitioner's complaint when the government failed to raise the point on appeal. That is incorrect. As this Court recognized in *Day* v. *McDonough*, 547 U.S. 198, 205-206 (2006), the non-jurisdictional character of a typical statute of limitations means that a federal court has no *obligation* to consider timeliness issues sua sponte, but it does not foreclose the court from doing so. That is particularly true where, as here under Section 2501, the limitations period applies to a suit for money damages against the United States and therefore is a condition on the waiver of sovereign immunity. See note 5, *supra*. In this case, moreover, the court of appeals would otherwise have been required to decide a constitutional question, see, *e.g.*, *Peters* v. *Hobby*, 349 U.S. 331, 338 (1955), and an amicus curiae argued in the court of appeals that

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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petitioner's complaint was untimely (and petitioner responded to that argument in its Federal Circuit reply brief), see Pet. App. 13a-14a. If this Court concludes that the six-year filing requirement is non-jurisdictional and waivable, and that the court of appeals was not required to consider the issue when the government did not invoke the bar on appeal, it would be appropriate to remand the case to allow the Federal Circuit to determine whether to consider the matter.

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IN THE

Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY, PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

ARGUMENT 1

A. The Text and Historical Context of § 2501 – Which Separates the Jurisdictional and Timeliness Inquiries – Should Be the Starting Point and Central Focus of Statutory Analysis. 5

B. Comparison of the Language of § 2501 With Those Statutes Granting Jurisdiction to the Court of Federal Claims Confirms its Non-jurisdictional and Procedural Nature. 7

C. The Government Mistakenly Discounts This Court's Recent Jurisprudence Applying Statutes of Limitations to Claims Against the Federal Government in the Same Manner as Among Private Parties, While Resurrecting a Discredited Line of Cases That Judicially Implied a Jurisdictional Limitation Into § 2501. 9

D. The Government's Policy Argument That a Statute of Limitations on a Waiver of Sovereign Immunity Affecting the Public Fisc Should Be Elevated to Jurisdictional Status Finds No Support in the Statutory Text, Conflicts With This Court's Recent Precedents, and Sweeps Too Broadly 17

E. Because the Government Deliberately Waived the Statute of Limitations, the Decision of the Court of Appeals to Raise the Statute of Limitations *Sua Sponte* Cannot Be Sustained on Discretionary Grounds. 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006) 6
Bowen v. City of New York,
476 U.S. 467 (1986) 3, 12, 20
Bowen v. Massachusetts,
487 U.S. 879 (1988) 19
Bowles v. Russell,
551 U.S. ___, 127 S.Ct. 2360 (June 14, 2007) 3, 16, 19
Burnett v. New York Cent. R. Co.,
380 U.S. 424 (1965) 17
Day v. McDonough,
547 U.S. 198 (2006) 19, 20
Farzana K. v. Indiana Dep't of Education,
473 F.3d 703 (7th Cir. 2007) 16
FDIC v. Meyer,
510 U.S. 471 (1994) 6
Franconia Associates v. United States,
536 U.S. 129 (2002) ..... *passim*
Grass Valley Terrace v. United States,
69 Fed. Cl. 341 (2005) 5
Hill v. United States,
149 U.S. 593 (1893) 10
Irwin v. Department of Veterans Affairs,
498 U.S. 89 (1990) ..... *passim*
John R. Sand & Gravel Co. v. United States,
457 F.3d 1345 (Fed. Cir. 2006) 1
John R. Sand & Gravel Co. v. United States,
143 Fed. Appx. 317 (Fed. Cir. 2005) 22
John R. Sand & Gravel Co. v. United States,
59 Fed. Cl. 645 (2004) 22, 23
Kendall v. United States,
107 U.S. 123 (1883) 9, 12
Larson v. Domestic & Foreign Commerce Corp.,
337 U.S. 682 (1949) 11, 15

Malone v. Bowdoin,
369 U.S. 643 (1962) 11, 15
Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 14
Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) 17
Rockwell Int'l Corp. v. United States,
549 U.S. ___, 127 S.Ct. 1397 (Mar. 27, 2007) 5
Scarborough v. Principi,
541 U.S. 401 (2004) 3, 19
Soriano v. United States,
352 U.S. 270 (1957) 9, 12, 13, 14
State Oil Co. v. Khan,
522 U.S. 3 (1997) 14
United States v. BASF-Inmont Corp.,
819 F. Supp. 601 (E.D. Mich 1993) 24
United States v. Beggerly,
524 U.S. 38 (1998) 15
United States v. Brockamp,
519 U.S. 347 (1997) 15
United States v. Causby,
328 U.S. 256 (1946) 11
United States v. Great Falls Mftg. Co.,
112 U.S. 645 (1884) 10
United States v. Lee,
106 U.S. 196 (1882) 11

STATUTES

5 U.S.C. § 702 19
28 U.S.C. § 1346(b)(1) 18
28 U.S.C. § 1491(a)(2) 18
28 U.S.C. § 1491(b) 18
28 U.S.C. § 2409(a) 15
28 U.S.C. § 2412 19
28 U.S.C. § 2501 ..... *passim*
28 U.S.C. § 2674-80 18
42 U.S.C. § 406(g) 19

42 U.S.C. § 2000e-16(a) 19
46 U.S.C. § 30901 18
Act of June 25, 1948, ch. 646, § 33, 62 Stat. 991 8

RULES

Fed. Rules Civ. Proc. 8(c) 19, 21
Fed. Rules Civ. Proc. 12(b) 21
Fed. Rules Civ. Proc. 15(a) 21
Rules of the Court of Federal Claims 8(c) 22
Rules of the Court of Federal Claims 12(b) 22
Rules of the Court of Federal Claims 15(a) 22

OTHER AUTHORITIES

Paul Frederic Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 Am. U. L. Rev. 301. 309 (1997) 10
Gregory C. Sisk, *Litigation with the Federal Government* § 4.08(f) (4th ed. 2006) 10
Black's Law Dictionary (6th ed 1990) 6

ARGUMENT

Having expressly agreed both in written submission and in open court that John R. Sand's claim alleging a taking of property had been timely filed in the Court of Federal Claims,[1] the United States now defends the *sua sponte* raising of the statute of limitations by the court of appeals by resurrecting a superseded line of decisions that had judicially implied a jurisdictional condition on statutes of limitations in federal government cases. The government modestly portrays its position before this Court as seeking merely to sustain a line of precedent characterizing the statute of limitations codified in 28 U.S.C. § 2501 as jurisdictional in nature.

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[1] In its brief (U.S. Br. at I), the United States reformulates the question presented before this Court to whether the court of appeals should have raised the timeliness question "even though the government did not argue on appeal that the suit was barred" by the statute of limitations. The government's failure to raise the issue on appeal by itself constituted an effective waiver of the statute of limitations. But, even more, the government's action here hardly can be characterized as one of omission. Although the government initially pleaded the statute of limitations as an affirmative defense in the Court of Federal Claims, after discovery and before trial, the government stipulated based on the evidentiary record that John R. Sand's claim accrued within the six-year limitations period (J.A. 37a-40a, Pet. App. 38a; see also U.S. Br. at 6). On appeal, when asked at oral argument, government counsel forthrightly conceded that the claim had accrued within the six-year statutory period and thus was not barred by the statute of limitations (Pet. App. 14a; see also *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1353 (Fed. Cir. 2006)).

The government's invocation of stare decisis comes nearly twenty years too late. In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court explicitly disavowed the government's favored precedent. The government fails to appreciate that the line of cases upon which its argument hinges was born during a nascent stage in the evolution of this Court's sovereign immunity jurisprudence and later was laid to rest when this Court returned its attention to the actual language of the pertinent statutory text and employed a more refined approach to statutory waivers of sovereign immunity.

The government's position both would depreciate the interpretive importance of giving full effect to the plain text of a statutory section in its historical legal context and would upset more than twenty years of this Court's considered decisions treating statutes of limitations and other time limitations on claims against the federal government as properly procedural:

First, § 2501 by its plain terms separates the timeliness inquiry from the threshold jurisdictional determination. In *Franconia Associates v. United States*, 536 U.S. 129, 145 (2002), after giving careful consideration to the statutory language and to the original legal understanding at the time of enactment of the predecessor statute, this Court rejected an "unduly restrictive" reading offered by the government and characterized § 2501 as an "unexceptional" statute of limitations that should be applied to the government in the same way that they apply to private parties.

Second, over the past two decades, this Court has repeatedly turned aside the government's insistence that time limitations should be treated as jurisdictional conditions on the waiver of sovereign immunity. *Bowen v. City of New York*, 476 U.S. 467 (1986); *Irwin, supra*; *Franconia; supra; Scarborough v. Principi*, 541 U.S. 401 (2004). Instead, and in a manner contradicting any jurisdictional classification (see *Bowles v. Russell*, 551 U.S. ___, 127 S. Ct. 2360, 2366 (June 14, 2007) (holding that the "Court has no authority to create equitable exceptions to jurisdictional requirements")), this Court has held that time limitations applicable to federal government cases (specifically including § 2501) presumptively are subject to equitable adjustment as are ordinary procedural rules. *Irwin, supra.*

Under this Court's sovereign immunity jurisprudence over the past two decades, this Court has maintained a strict and jurisdictional construction of the character and scope of claims for relief that are permitted against the federal government. But this Court increasingly has applied procedural requirements against the government in the same manner as among private parties.

Relying instead on policy arguments, the government would rigidly restructure a procedural rule into a jurisdictional absolute. The government insists that a statute of limitations applied to a waiver of sovereign immunity that has fiscal implications (which of course describes nearly *every* waiver of sovereign immunity) must be elevated to jurisdictional status. If, per the government's contention, statutory procedures attendant to waivers of sovereign immunity for

monetary relief are henceforth to be regarded as jurisdictional, the federal courts are about to become much busier than they already are.

By the government's light, whenever a claim for money damages is filed against the government, the federal courts would be obliged *sua sponte* to identify and thoroughly compare each allegation in the claim with an exhaustive (and exhausting) list of every statutory element, exception, time limitation, or other procedural requirement that conceivably could be invoked as a defense to the statutory waiver of sovereign immunity – regardless of whether the government has chosen to assert the matter and even when the government (as here) has deliberately conceded the point. Creating the duty to raise *sua sponte* the statute of limitations would by itself be a laborious imposition on the courts, as the timeliness inquiry often involves complex and fact-intensive questions of when the claim accrued, how the discovery rule should be applied, whether statutory or equitable tolling exceptions are available and how they should be applied, and whether a time bar applies to all claims or requests for relief or only to some.

Accordingly, upholding the venerable understanding that a statute of limitations is an affirmative defense that may be waived is not only consistent with the text and original understanding of § 2501 – and with this Court's rulings over the past two decades – but simply makes good sense for the effective administration of justice in the federal judiciary.

A. The Text and Historical Context of § 2501 – Which Separates the Jurisdictional and Timeliness Inquiries – Should Be the Starting Point and Central Focus of Statutory Analysis.

Reversing the ordinary approach to statutory interpretation, the government leads off with an extended discussion of caselaw and policy arguments and does not focus on the actual text of § 2501 until about two-thirds of the way through its brief (U.S. Br. at 29). And when it does belatedly turn to the language of the statute, the government asks this Court to imagine that a new word has been inserted into the key phrase, thereby altering the text to better align with the government's preferred meaning.

Section 2501 reads, in pertinent part: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claims first accrues." Under what the Chief Judge of the Court of Federal Claims has called the "plain English interpretation of the statute," *Grass Valley Terrace v. United States*, 69 Fed. Cl. 341, 347 (2005), this statute of limitations explicitly assumes that jurisdiction has been established before application of the time limitation. Section 2501 bars a claim that has been filed more than six years after the claim accrues, *when* the claim already is one that falls within the jurisdiction of the Court of Federal Claims (see Pet. Br. at 13-17). Thus, § 2501 is precisely the opposite of a clear statement by Congress directing that a "limitation on a statute's scope shall count as jurisdictional." See *Rockwell Int'l Corp. v. United States*, 549 U.S. ___ (slip

op. p. 9), 127 S.Ct. 1397, 1405-1406 (Mar. 27, 2007), quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-516 (2006).

Being uncomfortable with the plain import of the actual text, the government asks this Court to instead read the statute as if it provides that the statute of limitations applies whenever the Court of Federal Claims "*potentially*" has jurisdiction (U.S. Br. at 29-30). With such a textual revision, the government contends that the jurisdictional determination referenced in § 2501 is incomplete and remains open until evaluation of the timeliness of the claim. Unfortunately for the government, the word "potential" is not to be found in the language of the statute. Instead, the term "jurisdiction" in § 2501 is unencumbered and unqualified.[2]

Nor does the government offer any basis for believing that Congress mistakenly omitted the word "potential," either when the present statute was codified or when the predecessor statute was enacted, even if such extrinsic evidence could contradict the plain text of the statute. In fact, the government does

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[2] As noted in John R. Sand's opening brief (Pet. Br. at 26 n.5), the predecessor statute used the term "cognizable," whereas the current statute adopts the term "jurisdiction." As the government acknowledges (U.S. Br. at 30), "cognizable" is synonymous with "jurisdiction," meaning "within [the] jurisdiction of [a] court or power given to [a] court to adjudicate [a] controversy." See *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (quoting *Black's Law Dictionary* 259 (6th ed. 1990)). In the predecessor statute, the term "cognizable" was likewise unqualified and nothing in the text suggested that *potential* cognizability was the expectation.

not challenge John R. Sand's extensive description (Pet. Br. at 24-29) of the legislative history and the contemporary legal understanding surrounding the predecessor statute to § 2501. The legislative history confirms that Congress well understood how to express a jurisdictional grant and used the term "jurisdiction" to describe the class of claims that would be cognizable in the Court of Claims.

By contrast, Congress intended the statute of limitations to be applied in the same manner as among private parties (Pet. Br. at 27-28). Congress's selection of (non-jurisdictional) language commonly found in typical state statutes of limitations of the period, together with an appreciation for the contemporaneous legal environment, confirms the original understanding that this statute of limitations is a waivable defense (Pet. Br. at 28-29).

B. Comparison of the Language of § 2501 With Those Statutes Granting Jurisdiction to the Court of Federal Claims Confirms its Non-jurisdictional and Procedural Nature.

The government quarrels with John R. Sand's argument concerning the codification of 28 U.S.C. § 2501 in a procedural chapter within Title 28 of the United States Code, which is distinct in language and context from the grants of jurisdictional authority to the Court of Federal Claims that are codified in a separate chapter. The government emphasizes (U.S. Br. at 33-34), as John R. Sand forthrightly acknowledged in its opening brief (Pet. Br. at 20), that an uncodified provision from the 1948 codification of Title 28 stated that no inference is to be drawn from the

mere location of a section or from catch-lines in the title. Act of June 25, 1948, ch. 646, § 33, 62 Stat. 991. The government thereby misses the thrust of John R. Sand's argument and too readily slights the structure of Title 28 as being without purpose.

Far from placing conclusive weight on the placement of statutory provisions into a particularly-labeled chapter within Title 28, John R. Sand emphasizes the importance of comparing the distinctly different language adopted by Congress to achieve either jurisdictional or procedural purposes with respect to the Court of Federal Claims. Thus, while the mere location of a statutory section within Title 28 is not dispositive evidence of its nature, Congress's considered decision to codify Title 28 by organizing related provisions together in chapters was not a pointless exercise, devoid of any meaning.

John R. Sand's "structural" argument is another species of the textual argument, underscoring again that careful attention to the specific language employed by Congress should be the central focus of the interpretive quest. As explained in John R. Sand's opening brief (Pet. Br. at 19-24), those statutory provisions, gathered in Chapter 91 of the jurisdictional part of Title 28, that confer jurisdiction on the Court of Federal Claims generally do so by speaking directly in the language of "jurisdiction" and by defining the nature and scope of claims within the court's authority. By contrast, those provisions collected in Chapter 165 on "United States Court of Federal Claims Procedure," address procedural matters and refer to "jurisdiction," if at all, as a matter already confirmed or established.

C. The Government Mistakenly Discounts This Court's Recent Jurisprudence Applying Statutes of Limitations to Claims Against the Federal Government in the Same Manner as Among Private Parties, While Resurrecting a Discredited Line of Cases That Judicially Implied a Jurisdictional Limitation Into § 2501.

Passing lightly over the actual text and disregarding the original legal context and understanding of the statute, the government puts most of its eggs in the one basket of a line of cases beginning with *Kendall v. United States*, 107 U.S. 123 (1883), and ending with *Soriano v. United States*, 352 U.S. 270 (1957). But not only were those decisions doubtful when decided (Pet. Br. at 30-32), the government's precedential egg-basket has long since been upended by this Court (Pet. Br. at 33-40).

In a series of decisions, running from *Bowen* through *Irwin* and culminating most recently in *Franconia Associates*, this Court has rejected the government's plea for jurisdictional absolutism and instead has treated statutes of limitations applicable to claims against the federal government – specifically including the statute of limitations for the Court of Federal Claims (28 U.S.C. § 2501) – as subject to the same principles of equitable tolling as they would be in private litigation and as accruing under the same rules as applicable among private parties.

1. The *Kendall* line of cases arose during an early stage in the evolution of this Court's sovereign immunity jurisprudence. Faced with then-novel

legislation that afforded a general judicial remedy against the federal government for monetary claims, the Court mistakenly fell back upon the familiar but misplaced concept of subject matter jurisdiction in its cautious and uncertain approach to this new statutory category.

During this same time period, the Court narrowly construed the newly-enacted Tucker Act in a manner that denied the full judicial remedy intended by Congress for those suffering a taking of property by the government. If the government seized property (other than by statutorily-authorized condemnation)[3] or deprived individuals of the use of their property, the Court treated the government's action as a tort (trespass) and thus as falling outside of the jurisdictional authority granted by the Tucker Act. See *Hill v. United States*, 149 U.S. 593, 598 (1893). The Court thus left claimants in the awkward position of trying to file suits for specific relief, such as ejectment, against the government official in possession of the property, while contending that sovereign immunity did not bar the suit because the government officer was acting unconstitutionally. In a related but unwieldy

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[3] During this period, even a condemnation case did not give rise to a direct claim in court for a taking of the property founded on the Constitution. Instead, the Court implied a contractual promise by the government to pay just compensation, thus allowing a judicial remedy under the government contract jurisdiction of the Court of Claims. *United States v. Great Falls Mftg. Co.*, 112 U.S. 645, 656-57 (1884). On the evolution of takings claims under the Tucker Act, see generally Gregory C. Sisk, *Litigation With the Federal Government* § 4.08(f), at 327-28 (4th ed. 2006); Paul Frederic Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 Am. U. L. Rev. 301. 309 (1997).

attempt to accommodate the concept of sovereign immunity, the Court indulged the legal fiction that a suit for equitable relief against a government officer was not in substance a claim against the government itself, notwithstanding that the officer acted for the government and the relief granted directly affected the government. See *United States v. Lee*, 106 U.S. 196 (1882).

2. Over time, this Court has developed a more mature and refined approach toward the increasingly common-place judicial encounter with a statutory waiver of sovereign immunity and has corrected its earlier missteps. In 1946, this Court effectively overturned 50 years of caselaw and upheld jurisdiction under the Tucker Act for claims alleging any form or manner of the taking of property rights by the government: "If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine." *United States v. Causby*, 328 U.S. 256, 267 (1946).

Three years later, the Court abandoned the officer suit fiction in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949) (plurality), holding that the Court must look to the relief sought in the suit to determine whether, although nominally framed against an officer, the complaint in reality is pressed against the federal government itself. See also *Malone v. Bowdoin*, 369 U.S. 643 (1962) (holding that, unless a government officer acts beyond statutory or constitutional powers, the suit is one against the government itself and within the doctrine of federal sovereign immunity).

In the final stage in the evolution of sovereign immunity jurisprudence over the past quarter-century, this Court now demands an express and unambiguous congressional statement of consent to suit, with a strict and narrow construction applied to the scope of such consent, but by contrast construes procedural provisions in a manner consistent with private litigation.

3. In *Irwin*, in the course of stating a general presumption that a statute of limitations applicable to a waiver of sovereign immunity is subject to equitable tolling in the same manner as to private parties, the Court laid to rest the archaic *Kendall-Soriano* line of cases. The government resists this conclusion (see U.S. Br. at 36-39), apparently because *Irwin* failed to use the magic word "overrule." But *Irwin's* disavowal of *Soriano's* cramped jurisdictional approach hardly constituted a *sub silentio* overruling.

In the course of considering the availability of equitable tolling of the statute of limitations for Title VII claims against the government, the Court in *Irwin* settled upon a general presumption that every statute of limitations on a government claim is subject to equitable tolling. The Court noted that the prior holding in *Soriano* that a claim was "jurisdictionally barred" by § 2501 stood in tension with the tolling of the statute of limitations in a claim against the government in *Bowen v. City of New York*. See *Irwin*, 498 U.S. at 94 (explaining that decisions "have not been entirely consistent"). Considering the specific language of § 2501, in comparison with that for the time limit in Title VII, the Court concluded:

> An argument can undoubtedly be made that the latter language [§ 2501] is more stringent than the former [Title VII], but we are not persuaded that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling. Thus a continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government.

Id. at 95; see also *id.* at 98 (White, J., concurring in part and concurring in the judgment) (objecting to majority's holding because "it directly overrules a prior decision by this Court, *Soriano v. United States*, 352 U.S. 270 (1957)"). By adopting a general rule of equitable tolling in civil cases against the government, with specific reference to § 2501, the Court made plain the non-jurisdictional nature of these statutes of limitations.

The new path forged by *Irwin* was more recently confirmed in *Franconia*, where this Court unanimously rejected the government's argument for a "special" accrual rule under § 2501 by reason of sovereign immunity; described the government's position as an "unduly restrictive" reading of the congressional waiver of sovereign immunity, rather than "a realistic assessment of legislative intent;" declared that § 2501

by its language and the original understanding of its predecessor statute is an "unexceptional" statute of limitations; and stated that "limitations principles should generally apply to the Government in the same way that they apply to private parties." *Franconia*, 536 U.S. at 145.

4. As the government observes (U.S. Br. at 19-21), the Court generally is reluctant to disturb statutory precedents given that Congress remains empowered to correct any error that it perceives in the Court's interpretation of a statute. But even in cases of statutory interpretation, "stare decisis is not an inexorable command." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (unanimously overruling statutory interpretation precedent). This Court will overrule a statutory precedent when "the growth of judicial doctrine" has "weakened the conceptual underpinnings" of prior decisions. *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

Irwin's rejection of *Soriano* fits comfortably within this Court's general approach to stare decisis in the area of statutory interpretation. One "traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws." *Patterson*, 491 U.S. at 173 (internal citations omitted). As *Irwin* explained, the "ad hoc" approach to statutes of limitations applied in past inconsistent decisions, such as *Soriano*, had resulted in "continuing unpredictability without the corresponding advantage

of greater fidelity to the intent of Congress." *Irwin*, 498 U.S. at 94.

Accordingly, as had *Larson* through its clarification of sovereign immunity doctrine and abandonment of the awkward government officer suit fiction forty years earlier, *Irwin* "cut[] through the tangle of previous decisions" and adopted a general and consistent approach to procedural time limitations on statutory waivers of sovereign immunity. See *Malone*, 369 U.S. at 647 (describing *Larson* decision).

5. In the years since *Irwin*, when this Court has determined that an exceptional statute placing a time limitation on a claim against the federal government is not amenable to equitable tolling, the Court has found the *Irwin* presumption to be rebutted based upon a careful examination of the statutory language and an assessment of legislative intent – not by characterizing a statute of limitations as a jurisdictional requirement. See, *e.g.*, *United States v. Brockamp*, 519 U.S. 347, 350-52 (1997) (statutory limitations period on filing claims for tax refunds could not be equitably tolled in view of the tax statute's detailed, repetitive language and numerous exceptions); *United States v. Beggerly*, 524 U.S. 38, 47-49 (1998) (equitable tolling is not available under the Quiet Title Act, 28 U.S.C. § 2409a, which provides an "unusually generous" 12-year limitations period and already incorporates a form of tolling).

That a particular statute of limitations may be mandatory and not subject to deviation when properly invoked by a party does not make it a jurisdictional requirement that cannot be waived by a defendant and that must be raised on the court's own initiative. See

Farzana K. v. Indiana Dep't of Education, 473 F.3d 703, 705 (7th Cir. 2007) (Easterbrook, J.) ("The law is full of rules that are mandatory in the sense that courts must enforce them punctiliously if a litigant insists. Rules are not jurisdictional, however, no matter how unyielding they may be, unless they set limits on the federal courts' adjudicatory competence.").

6. This Court's decision last term in *Bowles v. Russell* offers no support for the government's assertion that § 2501 or any statute of limitations should necessarily be given a jurisdictional construction. In affirming the historical understanding that a timely notice of appeal is jurisdictional, the *Bowles* majority avoided any use of the phrase "statute of limitations" and any citation to decisions involving statutes of limitations, withholding any such mention even in response to references by the dissenting opinion. From the common law to the present, statutes of limitations have been understood as procedural in nature, an affirmative defense to be pleaded and established by the defendant, and subject to waiver or forfeiture (see Pet. Br. at 28-29).

Other than to confirm that no time limitation subject to equitable adjustment could be characterized as jurisdictional (*Bowles*, 127 S. Ct. at 2366), the *Bowles* Court carefully refrained from creating any conflict with other precedents that confirm statutes of limitations as subject to equitable tolling and waiver. Accordingly, *Bowles* is consistent with this Court's statute of limitations jurisprudence, which recognizes that statutes of limitations "are primarily designed to assure fairness to defendants," rather than to limit jurisdiction. See *Burnett v. New York Cent. R. Co.*, 380

U.S. 424, 428 (1965); see also *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944).

D. The Government's Policy Argument That a Statute of Limitations on a Waiver of Sovereign Immunity Affecting the Public Fisc Should Be Elevated to Jurisdictional Status Finds No Support in the Statutory Text, Conflicts With This Court's Recent Precedents, and Sweeps Too Broadly.

Before directing its attention to the text of the statute at issue in this case, the government presses the policy argument (U.S. Br. at 22-26) that, because the United States may not be sued at all without its consent, a time limitation on a statutory waiver of sovereign immunity that has financial implications for the government should be elevated to jurisdictional status. Although characterizing this hypothesis as "simply one means by which Congress has sought to maintain adequate control over the public fisc" (U.S. Br. at 25), the government does not base this argument on anything in the text or history of § 2501 that evidences such a congressional intent. Instead, the government invokes a general and vague policy of protecting federal funds that, upon inspection, simply proves too much.

Because it is not tethered to the text or history of a specific statutory provision, the government's policy argument effectively would transform every jot and tittle remotely related to a waiver of sovereign immunity into a jurisdictional command, impressing a duty on the federal courts to *sua sponte* ascertain the

satisfaction of each statutory element, regardless of whether the government raises or even deliberately waives the matter.

The government's abstract "protection-of-the-public-fisc" rationale for conversion of a procedural rule into a jurisdictional requirement is mistaken, misplaced, or overstated in several ways.

1. Section 2501 applies to more than monetary claims against the public fisc. Even though the traditional money claim under the Tucker Act remains the grist for the Court of Federal Claims mill, Congress increasingly has granted to the Court of Federal Claims meaningful and considerable equitable powers. Under 28 U.S.C. § 1491(a)(2), the Court of Federal Claims may grant equitable relief collateral to a money judgment.

In addition, the Court of Federal Claims has jurisdiction to grant declaratory and injunctive relief, as well as or rather than money damages, in bid protest cases. 28 U.S.C. § 1491(b). Thus, § 2501 – as the general statute of limitations for claims in the Court of Federal Claims – is not a peculiar proviso attached to a particular jurisdictional grant that invariably involves a monetary claim.

2. The government's "public-fisc-protection-equals-jurisdiction" argument has no logical stopping place, either to apply only to one statutory waiver of sovereign immunity or to apply only to a time limitation. Nearly every statutory waiver of sovereign immunity – including the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2674-80; the Suits in Admiralty Act, 46 U.S.C. § 30901 *et seq.*; Title VII of the Civil

Rights Act of 1964, 42 U.S.C. § 2000e-16(a); and, the statute that gives rise to the greatest number of lawsuits each year against the federal government, the Social Security Act, 42 U.S.C. § 406(g) – authorizes court awards that confer monetary relief. Even the Administrative Procedure Act, 5 U.S.C. § 702, has been construed to allow the courts to order specific relief for payment of money by the federal government. See *Bowen v. Massachusetts*, 487 U.S. 879, 891-908 (1988).

Thus, the government's public fisc argument sweeps within the jurisdictional ambit the procedural provisions of nearly every one of the dozens of federal statutes that waive sovereign immunity.[4] But see *Scarborough*, 541 U.S. at 420-21 (holding that the time prescription for seeking attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 – yet another waiver of sovereign immunity for a monetary award – should apply to the government in the same

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[4] Extrapolating from the fact that the time period for filing a notice of appeal held to be jurisdictional in *Bowles v. Russell* was found in a statute (rather than a court rule), amicus Metamora Group suggests that every time limitation stated in a statute should henceforth be regarded as jurisdictional (Amicus Metamora Group Br. at 17-20). The Metamora Group's argument would radically change the historical and universal understanding of statutes of limitations. Every statute of limitations, of course, is a *statute* of limitations. If every statute of limitations were now to be converted into a jurisdictional prerequisite, the traditional understanding of statutes of limitations as waivable affirmative defenses would be turned upside down, Federal Rule of Civil Procedure 8(c) would be effectively repealed, and this Court's recent decision in *Day v. McDonough*, 547 U.S. 198, 205 (2006), that "[a] statute of limitations defense * * * is not 'jurisdictional,' " would be abruptly overruled. And, indeed, the Metamora Group (Amicus Metamora Group Br. at 22-24) does urge this Court to overrule its recent (and unanimous on this point) decision in *Day*.

way as to private parties); *Bowen v. City of New York*, 476 U.S. at 478-82 (rejecting the argument that the time limitation for district court review of claims seeking disability benefits from the government is jurisdictional).

Nor can the government's argument that any limitation that protects the public fisc thereby takes on jurisdictional dimension be confined to time limitations for filing, as every statutory element, limitation, exception, and procedural requirement has a more or less direct consequence for whether a claim will proceed to eventual success and a monetary judgment. Thus, the government's argument effectively demands jurisdictional rigidification of every word and phrase contained within every statute related to a waiver of sovereign immunity.

3. Premised as the government's argument is on the proposition that "in a suit against the United States, the terms of the government's consent define the jurisdiction of the court" (U.S. Br. at 9; see also U.S. Br. at 23), this policy rationale is weakest when applied as here to a taking claim, given the self-animating nature of the Fifth Amendment just compensation clause. As explained in John R. Sand's opening brief (Pet. Br. at 43), a canon of strict construction, especially one that implies jurisdictional status in an unexceptional statute of limitations, is misplaced when applied to a self-executing constitutional claim.

E. Because the Government Deliberately Waived the Statute of Limitations, the Decision of the Court of Appeals to Raise the Statute of Limitations *Sua Sponte* Cannot Be Sustained on Discretionary Grounds.

This Court should not be distracted by amicus Metamora Group's demand (Amicus Metamora Group Br. at 3-16) to be recognized as some kind of *über*-amicus, which then is privileged to shoulder the United States aside and override its deliberate waiver of any objection to the timeliness of John R. Sand's claim, to rewrite the jurisdictional decision of the court of appeals into an unremarkable exercise of discretion, or to presume to suggest that this Court acted improvidently in granting the petition for certiorari.

As discussed in John R. Sand's opening brief (Pet. Br. at 47-48), the government expressly conceded in open court that the claim was timely and not barred by the statute of limitations, the court of appeals made plain that its decision was grounded solely on the purported jurisdictional nature of the statute of limitations, and this Court has held that it is an abuse of discretion for a court to override a party's conscious waiver of a statute of limitations.

In *Day v. McDonough*, 547 U.S. at 202, this Court's adamance about the constrained discretion of a court to raise a statute of limitations issue *sua sponte* was unusually explicit: "Ordinarily in civil litigation, a statutory time limit is forfeited if not raised in a defendant's answer or in an amendment thereto. Fed. Rules Civ. Proc. 8(c), 12(b), and 15(a). And we would

count it an abuse of discretion to override a State's deliberate waiver of a limitations defense."[5] Subsequently in the majority opinion, the Court emphasized that point again: "A district court's discretion is confined within these limits. As earlier noted, should a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice." 547 U.S. at 210 n.11. Three members of the Court would have gone further and held that a court lacks discretion under *any* circumstances to revive a waived statute of limitations objection, whether the waiver was deliberate or inadvertent. *Id.* at 212-19 & n.3 (Scalia, J., dissenting).

Amicus Metamora Group wrongly insists that it has special privileges to stand in the shoes of an actual party to the suit and to direct the management of litigation involving the federal government. First, the Metamora Group's motion to intervene either as of right or permissively into this lawsuit was denied by the Court of Federal Claims, ironically in part because it was not timely filed, *John R. Sand & Gravel Co. v. United States*, 59 Fed. Cl. 645 (2004), and that denial was affirmed on appeal by the Federal Circuit, *John R. Sand & Gravel Co. v. United States*, 143 Fed. Appx. 317 (Fed. Cir. 2005). As the Court of Federal Claims correctly ruled: "This court can only determine whether plaintiff is entitled to just compensation; it cannot determine whether members of the Metamora Group must pay defendant the amount of any judgment

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[5] *Day*'s holding applies to pleadings in the Court of Federal Claims. Rules 8(c), 12(b) and 15(a) of the Rules of the Court of Federal Claims mirror their counterparts in the Federal Rules of Civil Procedure.

the court may grant in this case. Intervenor-applicants can protect their interest by contesting in another forum any attempt by defendant to seek reimbursement for any settlement or judgment that may occur in this case." *John R. Sand*, 59 Fed. Cl. at 652.

Second, collaterally interested parties have no standing to override the ordinary rules of litigation, including those regarding waiver of an affirmative defense. Other parties potentially affected by or possibly liable to indemnify or reimburse a defendant for liability to a plaintiff are commonly in the background in many types of lawsuits. Amicus Metamora Group's situation and status here is no different from that of insurers, contractual indemnitors, corporate shareholders, other tortfeasors, and other derivatively liable persons who may be affected by the outcome of a liability suit or whose duty of contribution in tort or indemnification by contract may be triggered by the outcome of a liability suit against a particular defendant, but who have no right to control the litigation absent intervention.

The government's deliberate waiver of the statute of limitations may (or may not) provide a defense to the amicus to a later claim by the government for indemnification.[6] But that is an intramural matter between amicus Metamora Group

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[6] The Metamora Group acknowledges in a footnote that its liability does not automatically follow from a judgment in favor of John R Sand. Amicus Metamora Group Br. at 13 n.6. In sum, the question of any application of this matter to a future proceeding is collateral and premature.

and the United States for possible future resolution in another proceeding before a different court (which would be neither the Court of Federal Claims nor the Federal Circuit).[7] It does not affect the government's waiver of the statute of limitations as to John R. Sand in this matter filed in the Court of Federal Claims, is of no interest to this Court on review of the decision of the Federal Circuit, and is of no significance to the disposition of this present matter.

CONCLUSION

The judgment of the court of appeals should be reversed, the dismissal of petitioner's complaint should be vacated, and this case should be remanded for further proceedings on the merits.

Respectfully submitted,

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[7] The United States District Court for the Eastern District of Michigan has continuing jurisdiction over disputes arising from the consent decree between the United States and the Metamora Group regarding this hazardous waste site. *United States v. BASF-Inmont Corp.*, 819 F. Supp. 601, 630 (E.D. Mich 1993).

295

No. 06-1164

IN THE
Supreme Court of the United States

John R. Sand & Gravel Co.,
Petitioner,

v.

United States,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE METAMORA GROUP AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF THE *AMICUS CURIAE* 1
STATEMENT 1
I. THIS COURT SHOULD EITHER AFFIRM THE COURT OF APPEALS OR, IN THE ALTERNATIVE, DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED ON THE GROUND THAT THE COURT OF APPEALS DID NOT NEED TO REACH THE QUESTION WHETHER SECTION 2501 IS JURISDICTIONAL 3
A. The Court of Appeals Erred in Concluding that It Was Required to Decide as a Threshold Matter Whether Section 2501 Imposes a Limitation on Subject-Matter Jurisdiction. 7
B. There Were No Barriers to the Federal Circuit's Application of Section 2501's Time Limit as a Matter of Discretion 11
II. SECTION 2501 IS A MANDATORY, JURISDICTIONAL LIMITATION ON THE FILING OF SUITS AGAINST THE UNITED STATES 17
A. This Court's Decision in *Bowles v. Russell* Confirms This Court's Repeated Prior Holdings That Section 2501 Limits the Court of Federal Claims' Subject-Matter Jurisdiction 17
B. Petitioner's Attempts to Distinguish This Court's Precedent Are Unavailing. 21
C. The Conclusion That Section 2501 Is Jurisdictional is Consistent With This Court's Equitable Tolling Jurisprudence 24
CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Ashwander v. *TVA*, 297 U.S. 288 9
Block v. *North Dakota*, 461 U.S. 273 (1983) 21
Board of Regents v. *Tomanio*, 446 U.S. 478 (1980) 21
Bowles v. *Russell*, 127 S. Ct. 2360 (2007) ..... passim
California v. *Arizona*, 440 U.S. 59 (1979) 21
Carnival Cruise Lines v. *Shute*, 499 U.S. 585 (1991) 9
Chambers v. *NASCO*, 501 U.S. 32 (1991) 11
Coleman v. *Miller*, 307 U.S. 433 (1939) 21
Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 27
DaimlerChrysler Corp. v. *Cuno*, 126 S. Ct. 1854 (2006) 20
Day v. *McDonough*, 547 U.S. 198 (2006) ..... passim
Demore v. *Kim*, 538 U.S. 510 (2003) 12
Eberhart v. *United States*, 546 U.S. 12 (2005) 19, 20
Fry v. *United States*, 421 U.S. 542 (1975) 12
Gomez v. *United States*, 490 U.S. 858 (1989) 9
Granberry v. *Greer*, 481 U.S. 129 (1987) 11, 14, 15, 16
Gray v. *Netherland*, 518 U.S. 152 (1996) 17
Gulf Oil Corp. v. *Gilbert*, 330 U.S. 501 (1947) 12
Gupta v. *Thai Airways Int'l Ltd.*, 487 F.3d 759 (9th Cir. 2007) 5
Harris Truck Lines, Inc. v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) 19, 20, 25
Hibbs v. *Winn*, 542 U.S. 88 (2004) 27
Hormel v. *Helvering*, 312 U.S. 552 (1941) 14
In re Papandereou, 139 F.3d 247 (D.C. Cir. 1998) 8
INS v. *St. Cyr*, 533 U.S. 289 (2001) 23
Irwin v. *Dep't of Veterans Affairs*, 498 U.S. 89 (1990) passim
Irwin v. *Veterans Admin.*, 874 F.2d 1092 (5th Cir. 1989) 25
John R. Sand & Gravel Co. v. *Brunswick Corp.*, 143 F. App'x. 317 (Fed. Cir. 2005) 12, 14
John R. Sand & Gravel Co. v. *United States*, 127 S. Ct. 2877 (2007) 6

John R. Sand & Gravel Co. v. *United States*, 59 Fed. Cl. 645 (2004) 2
John R. Sand & Gravel Co. v. *United States*, 60 Fed. Cl. 272 (2004) 13
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 20, 22
Leatherman v. *Tarrant County Narcotics Intel. & Coord. Unit*, 507 U.S. 163 (1993) 27
Link v. *Wabash R.R. Co.*, 370 U.S. 626 (1962) 11
Mass. Food Ass'n v. *Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560 (1st Cir. 1999) 12
Molina v. *INS*, 981 F.2d 14 (1st Cir. 1992) 12
Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999) 7
Pinney Dock & Transp. Corp. v. *Penn Cent. Corp.*, 838 F.2d 1445 (6th Cir. 1988) 12
Plaut v. *Spendthrift Farm*, 514 U.S. 211 (1995) 10
Romero v. *Int'l Terminal Operating Co.*, 358 U.S. 354 (1959) 20
Ruhrgas AG v. *Marathon Oil Co.*, 526 U.S. 574 (1999) 7, 8
Scarborough v. *Pargoud*, 108 U.S. 567 (1883) 18
Scarborough v. *Principi*, 541 U.S. 401 (2004) 28
Schiro v. *Farley*, 510 U.S. 222 (1994) 11
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 10
Singleton v. *Wulff*, 428 U.S. 106 (1976) 12, 14
Sinochem Int'l Co. v. *Malaysian Int'l Shipping Corp.*, 127 S. Ct. 1184 (2007) 8
Soriano v. *United States*, 352 U.S. 270 (1957) ..... passim
Sosa-Valenzuela v. *Gonzales*, 483 F.3d 1140 (10th Cir. 2007) 5
Spector Motor Serv. v. *McLaughlin*, 323 U.S. 101 (1944) 9
Steel Co. v. *Citizens for Better Env't*, 523 U.S. 83 (1998). 7, 8
Swan v. *Peterson*, 6 F.3d 1373 (9th Cir. 1993) 12
Teague v. *Lane*, 489 U.S. 288 (1989) 14, 15
TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 27
United States v. *BASF-INMONT Corp.*, 819 F. Supp. 601 (E.D. Mich. 1993) 2

United States v. *Beggerly*, 524 U.S. 38 (1998) 26, 27
United States v. *Brockamp*, 519 U.S. 347 (1997) 26, 27
United States v. *Curry*, 47 U.S. 106 (1848) 18
United States v. *Dalm*, 494 U.S. 596 (1990) 27
United States v. *Resendiz-Ponce*, 127 S. Ct. 782 (2007) 8
Valley Forge Christian Coll. v. *Ams. United for Separation of Church & State*, 454 U.S. 464 (1982) 21
Young v. *United States*, 535 U.S. 43 (2002) 26

Constitutional Provisions

U.S. CONST. AMEND. V 28

Statutes

26 U.S.C. 6511(d) 28
28 U.S.C. 1491(a)(1) 10, 21
28 U.S.C. 2107(c) 17, 19
28 U.S.C. 2244(d)(1)(A) 23
28 U.S.C. 2501 ..... passim
42 U.S.C. 2000e-16(c) 24, 27

Rules

S. Ct. R. 37.6 1

INTEREST OF THE *AMICUS CURIAE*[1]

The Metamora Group is a group of companies that disposed of waste in a landfill, which ultimately required environmental remediation. That remediation, which petitioner claims constituted a "taking" of its alleged right to mine within the landfill, forms the basis for petitioner's underlying claim in this matter. Metamora entered into a Consent Decree in 1993 with the United States, establishing Metamora's cleanup responsibilities related to the landfill. The United States has indicated that, under the Consent Decree, it will seek indemnification from Metamora for any liability to petitioner. Metamora participated in settlement negotiations, unsuccessfully attempted to intervene in the case in the trial court, and participated as *amicus curiae* in the court of appeals at the direction of the court. It was Metamora that raised the question of the timeliness of petitioner's suit in the court of appeals.

STATEMENT

Petitioner brought this suit in the Court of Federal Claims under the Tucker Act alleging that respondent had taken its property rights without just compensation. At the inception of the case, in its Motion to Dismiss, respondent argued, *inter alia*, that the suit was filed too late under the applicable six-year statutory time limitation in 28 U.S.C. 2501 ("Section 2501"). The trial court denied respondent's Motion to Dismiss. Ultimately, the trial court ruled in favor of respondent on the merits following trial.

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[1] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

Amicus curiae, the Metamora Group ("Metamora" or "Group"), a group of companies that disposed of waste in a landfill located on the property, and respondent entered into a Consent Decree ("Decree") in establishing Metamora's cleanup responsibilities related to the landfill. Respondent contends that the Decree requires Metamora to pay any judgment in petitioner's favor in this case. The Decree provides that the "United States' costs in this effort, including attorney's fees and other expenses and any compensation that the United States may be required to pay to the property owner, shall be considered costs of response and shall be reimbursed by [Metamora]." *John R. Sand & Gravel Co.* v. *United States*, 59 Fed. Cl. 645, 653 n.6 (2004) (citing *United States* v. *BASF-INMONT Corp.*, 819 F. Supp. 601, 620 (E.D. Mich. 1993)).

Metamora unsuccessfully sought intervention in the suit and also raised the timeliness defense in its proposed Answer. On appeal, respondent did not pursue the issue. Metamora, however, pressed it in an *amicus* brief. Petitioner's Reply Brief addressed the limitations argument (which, as noted, petitioner had also litigated in the trial court), and the parties addressed it at oral argument.

The court of appeals agreed with *amicus* that the suit was not timely filed and ordered the complaint dismissed. As a preliminary matter, the court held that it was obligated to decide the limitations issue notwithstanding that respondent had not pressed it. The court reasoned that "we must be satisfied that the court whose opinion is the subject of our review properly exercised jurisdiction, regardless of whether the parties challenge the lower court's jurisdiction." Pet. App. 15a. Because settled precedent of this Court and the Federal Circuit provided that the period of "limitations set forth in section 2501 is a jurisdictional requirement for a suit

in the Court of Federal Claims," the court held that "it may not be waived." *Id.* 16a.

On the merits of the limitations issue, the court of appeals held that petitioner's takings claim was not timely filed because it accrued in 1994, more than six years prior to the filing of petitioner's suit in 2002.

I. THIS COURT SHOULD EITHER AFFIRM THE COURT OF APPEALS OR, IN THE ALTERNATIVE, DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED ON THE GROUND THAT THE COURT OF APPEALS DID NOT NEED TO REACH THE QUESTION WHETHER SECTION 2501 IS JURISDICTIONAL.

This Court granted certiorari to decide whether Section 2501 limits the subject matter jurisdiction of the Court of Federal Claims. However, respondent raised in its brief in opposition (at 14-15), and petitioner has urged this Court in its brief on the merits (at 47-48), to decide an additional issue: whether the Federal Circuit would properly have analyzed the application of the six-year limitations period in any event as a matter of discretion rather than obligation, without regard to whether Section 2501 is jurisdictional.

This Court should either affirm the judgment of the court of appeals or alternatively dismiss the writ of certiorari as improvidently granted on the basis of that question. The issue is logically antecedent to the question presented, which at bottom asks whether the statutory time limitation is waivable or not. The logical progression of issues in determining whether to address the limitations period is: (i) whether the question was waived by a party; if so, (ii) whether the court should nonetheless exercise its discretion to decide the issue on some other basis (such as that it was presented by an

amicus); and if not, (iii) whether the issue must nonetheless be reached because it is not subject to waiver.

The court of appeals was not required by Article III of the Constitution to determine the jurisdictional status of Section 2501. A court's only obligation is to refrain from *reaching the merits* of the case without assuring itself of its jurisdiction. The Federal Circuit would not have impermissibly reached the merits by applying the *identical* statutory time limitation as a matter of its discretion, rather than first deciding the academic question of whether the limitations period is jurisdictional. See Part I.A, *infra*. Courts have discretion to consider questions raised by *amici* rather than the parties in appropriate circumstances. See Part I.B, *infra*. Further, had the court of appeals analyzed the question properly, it would have invoked its discretion to decide the argument raised by *amicus* without regard to whether the time period is jurisdictional because (i) *amicus* has a unique and substantial interest in the outcome of the case (in light of respondent's contention that *amicus* is obligated to pay any eventual judgment); (ii) in denying Metamora party status, the court of appeals had invited it to present its arguments as an *amicus*; (iii) the issue of whether Section 2501 barred petitioner's claim was addressed by the parties in the Court of Federal Claims, fully considered by the trial court, and addressed in the briefing and oral argument on appeal; and (iv) the relevant facts governing the application of Section 2501 are undisputed.

Affirmance or dismissal on this ground is appropriate for four reasons. First, this Court's guidance concerning the courts of appeals' obligation to decide jurisdictional questions and to issue jurisdictional rulings that are broader than necessary to dispose of the case would be of substantial benefit to courts of appeals nationwide. By contrast, the question presented – whether Section 2501 limits subject-matter jurisdiction – rarely arises and is not the subject of a circuit con-

flict. As a practical matter, that issue arises only on the rare occasion that the United States government fails to invoke a meritorious limitations defense that a claim is time-barred, which infrequently occurs.

By contrast, lower courts regularly confront the questions of whether and when to address their jurisdiction as a threshold matter. They often invoke a broad rule that they must first determine their own jurisdiction,[2] when, in fact, it is in many cases more appropriate to resolve a case on alternative non-merits grounds. See Part I.A, *infra*.

Second, the question presented has no consequence even for the parties to this case, because petitioner would be time-barred under Section 2501 regardless of whether it is jurisdictional. That is because, even if petitioner prevails in this Court with respect to the question presented, the court of appeals on remand will no doubt once again apply Section 2501 to bar the lawsuit as a matter of its discretion. Thus, the question presented for this Court's resolution is largely academic and can have no practical impact on the disposition of this case.

Third, as is discussed *infra*, established principles of judicial restraint counsel against resolution of the question presented. The question presented implicates numerous difficult constitutional questions under the Fifth Amendment and Article III, as well as competing assertions regarding whether precedent of this Court should be overruled. Those questions should be avoided if possible. When, as here, there are non-constitutionally sensitive grounds for resolving a case, con-

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[2] See, *e.g.*, Pet. App. 15a; *Gupta* v. *Thai Airways Int'l Ltd.*, 487 F.3d 759, 763 (9th Cir. 2007); *Sosa-Valenzuela* v. *Gonzales*, 483 F.3d 1140, 1143 (10th Cir. 2007).

sistent with principles of stare decisis, those arguments should be resolved at the outset.

Fourth, the equities weigh strongly against resolving this case on the basis of whether Section 2501 is jurisdictional, without considering Section 2501's application as a matter of discretion. The Federal Circuit's ruling that petitioner filed this suit too late is now final.[3] Although petitioner attempts to resurrect the case on the basis of a waiver by respondent of the limitations period, it is *amicus* that (according to respondent) must pay any judgment on the complaint. *Amicus*, however, has consistently pressed the limitations defense throughout the case and should be entitled to have its defenses to liability heard.

That conclusion is reinforced by the fact that, as evidenced by the record below, petitioner impermissibly sat on its rights before bringing this action and in any event has no claim on the merits. The Court of Federal Claims rejected petitioner's takings claim on the merits, and even the dissenting judge in the court of appeals would have affirmed on that basis. See Pet. App. 20a-28a; *id.* 39a-40a (Newman, J., dissenting). Petitioner challenges respondent's interference with its "exclusive right of use" of its property. But that interference began in 1992 or, at the very latest, when a fence was installed pursuant to the cleanup of the property in 1994. Petitioner, moreover, must have recognized that its takings claim was exceedingly weak. It voluntarily assisted in the expansion and operation of the landfill and, through that as-

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[3] The merits of the Federal Circuit's ruling concerning the accrual of petitioner's claim under Section 2501 was the second question presented by the Petition for Certiorari. See Pet. i. This Court granted certiorari limited to the first question, whether the limitations period is jurisdictional. See *John R. Sand & Gravel Co.* v. *United States*, 127 S. Ct. 2877 (2007).

sistance and its presence at the site during that time period, knew that huge quantities of waste (including tens of thousands of barrels of waste) were being deposited in the landfill. See Pet. App. 4a (summarizing Court of Federal Claims findings).

The judgment should accordingly be affirmed on alternative grounds or the writ of certiorari dismissed as improvidently granted.

A. THE COURT OF APPEALS ERRED IN CONCLUDING THAT IT WAS REQUIRED TO DECIDE AS A THRESHOLD MATTER WHETHER SECTION 2501 IMPOSES A LIMITATION ON SUBJECT-MATTER JURISDICTION.

The Federal Circuit erred in deciding whether Section 2501's time limitation may be waived, when the case could have been resolved simply by applying the statutory time limitation as a matter of discretion. The court of appeals considered itself bound to resolve the waiver question, reasoning that "[a]s an appellate court, we must be satisfied that the court whose opinion is the subject of our review properly exercised jurisdiction, regardless of whether the parties challenge the lower court's jurisdiction." Pet. App. 15a. But that overstates the rule. As this Court has explained, a federal court ordinarily "must be sure of its own jurisdiction *before getting to the merits*" of a case. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (emphasis added). Courts remain free to address alternative procedural questions that are "'logically antecedent' to Article III's [subject-matter jurisdictional] concerns." *Ibid.* (citing *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 88-89 (1998)).

On the basis of that principle, in *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574 (1999), this Court unanimously

held that, in appropriate cases, a court may decide personal jurisdiction before subject matter jurisdiction. This Court acknowledged the rule established in *Steel Co.*, *supra*, that "Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case." 526 U.S. at 583. But, "[w]hile *Steel Co.* reasoned that subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues." *Id.* at 584. Although a court "act[s] ultra vires" if it "pronounce[s] upon [the merits] when it has no jurisdiction to do so" (*id.* at 583 (quoting *Steel Co.*, 526 U.S. at 583) (third alteration in *Ruhrgas*)), a "court that dismisses on . . . non-merits grounds such as . . . personal jurisdiction, before finding subject-matter jurisdiction, makes no assumption of law-declaring power" (*id.* at 584 (quoting *In re Papandereou*, 139 F.3d 247, 255 (D.C. Cir. 1998)) (alterations in *Ruhrgas*)). Thus, "[i]t is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." *Id.* at 585. *See also Sinochem Int'l Co.* v. *Malaysian Int'l Shipping Corp.*, 127 S. Ct. 1184 (2007).

Those cases make clear that nothing in Article III or this Court's jurisdictional precedents compelled the Federal Circuit to resolve the question of its subject-matter jurisdiction before applying Section 2501 as a matter of discretion, regardless of its waivability. The court would decide the same substantive limitations question in either event.

The court of appeals' failure to address the alternative, discretionary barrier to jurisdiction was particularly problematic in this case. Courts have a well-established obligation to avoid resolving questions of constitutional law unnecessarily. See *United States* v. *Resendiz-Ponce*, 127 S. Ct. 782, 785 (2007) (declining to address a constitutional question that was not "absolutely necessary to a decision of the case")

(quoting *Ashwander* v. *TVA*, 297 U.S. 288); *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."). While courts have no general obligation to postpone questions of their jurisdiction, different considerations arise when the question of jurisdiction implicates questions of constitutional law. Cf. *Carnival Cruise Lines* v. *Shute*, 499 U.S. 585, 589 (1991) (declining to consider "constitutional argument as to personal jurisdiction" and resolving issue of contract interpretation of forum selection clause). This is particularly true when – as under the Tucker Act – jurisdiction is conferred on a federal court by statute. See *Gomez* v. *United States*, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.").

In this case, the Court's resolution of the question of whether Section 2501's time limitation is jurisdictional implicates important constitutional questions. Petitioner and its *amici* urge this Court to construe the Fifth Amendment to hold that the government does not have sovereign immunity under the Takings Clause. See Pet. Br. 10-11; Br. *Amicus Curiae* of Pac. Legal Found. in Support of Pet. 3-6; Br. *Amicus Curiae* of Nat'l Ass'n of Home Builders in Support of Pet. 14-21. Moreover, the answer to the question presented is rooted in the power of federal courts to decide cases and controversies. Each determination of jurisdiction derives ultimately from the extension of "[t]he judicial power" under Article III of the Constitution, and thus, an inquiry into Section 2501's jurisdictional status is an inquiry into the ability of the Court of Federal Claims to constitutionally exercise its judicial power over claims filed against the United States.

Moreover, the jurisdictional character of Section 2501 also implicates the ability of the Court of Federal Claims to "render judgment upon any claim against the United States founded . . . upon the Constitution," 28 U.S.C. 1491(a)(1), depending on when such claim accrues. Pet. at 1.

In addition, petitioner's arguments seek, for all intents and purposes, to overturn precedent holding that Section 2501 is a condition on the federal government's waiver of its sovereign immunity and therefore is jurisdictional. Pet. Br. 30-32. Conversely, *amicus* argues later in this brief that the precedents on which respondent relies should be limited or overturned to the extent they conflict with this Court's decision in *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007). See Part II, *infra*. Whatever the ultimate answer to those difficult questions, basic principles of *stare decisis* dictate that precedent should be overturned only when truly necessary to the decision of a case. See *Seminole Tribe* v. *Florida*, 517 U.S. 44, 63 (1996) ("Generally, the principle of *stare decisis*, and the interests that it serves, . . . counsel strongly against reconsideration of our precedent."). When, as here, there are non-constitutionally sensitive grounds for resolving a case, consistent with principles of stare decisis, those arguments should be resolved at the outset.

In short, given the difficult and sensitive legal implications of the jurisdictional question, the Federal Circuit in this case was under an obligation, rooted in constitutional separation-of-powers concerns, to dispose of the case on a ground that avoided triggering constitutional and stare decisis concerns and to decide the case on the alternative and narrower ground that Section 2501 barred petitioner's claim as a matter of discretion. Cf. *Plaut* v. *Spendthrift Farm*, 514 U.S. 211, 217 (1995) (addressing "the narrower ground for adjudication of the constitutional questions in the case"). The court of appeals' assumption that Article III *required* it to

resolve the question of Section 2501's jurisdictionality, before reaching any other issue, thus gets this Court's precedent and constitutional principles of judicial restraint backwards.

B. THERE WERE NO BARRIERS TO THE FEDERAL CIRCUIT'S APPLICATION OF SECTION 2501'S TIME LIMIT AS A MATTER OF DISCRETION.

Nothing in the procedural history of this case precluded the Federal Circuit from dismissing the case on discretionary, rather than subject matter jurisdiction, grounds. While courts generally limit themselves to the questions presented by the parties, the discretion to entertain a threshold defense not raised by a party is an "inherent power of lower federal courts." *Chambers* v. *NASCO*, 501 U.S. 32, 46 (1991). These inherent powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962) (concluding that a district court possessed the inherent power to dismiss a case *sua sponte* for failure to prosecute).

A court accordingly may, in appropriate circumstances, raise and decide issues – including the invocation of a statutory time limit – *sua sponte*.[4] That same authority permits a

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[4] *See Day* v. *McDonough*, 547 U.S. 198, 205-06 (2006) (treating statute of limitations, exhaustion, and retroactivity defenses similarly and concluding that "federal appellate courts have discretion to consider" these defenses "despite the State's failure to interpose the defense at the district-court level"); *Schiro* v. *Farley*, 510 U.S. 222, 229 (1994) (exercising discretion to address retroactivity defense not raised below); *Granberry* v. *Greer*, 481 U.S. 129 (1987) (court of appeals had discretion to determine whether an exhaus-

federal court to decide issues raised by *amici curiae*. See, *e.g.*, *Demore* v. *Kim*, 538 U.S. 510, 516 (2003) (addressing argument raised by *amici* that statute foreclosed judicial review); *Fry* v. *United States*, 421 U.S. 542, 545 n.5 (1975) (addressing statutory argument raised by *amici*). The courts of appeals have invoked their discretion to determine whether an issue raised by *amici* on appeal is appropriate for resolution, and have reached different results depending on the factual circumstances of the case.[5]

The Federal Circuit's resolution of the alternative, non-jurisdictional argument concerning discretionary application of Section 2501 was particularly warranted in this case, for four reasons. First and most importantly, as the court of appeals recognized, Metamora is not an ordinary *amicus* and, in fact, has a "substantial interest . . . in this litigation." *John R. Sand & Gravel Co.* v. *Brunswick Corp.*, 143 F. App'x. 317, 319 (Fed. Cir. 2005). Metamora's interest is much stronger

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tion defense has been properly waived); *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."); *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 502 (1947) (a federal court "has inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens*").

[5] See *Mass. Food Ass'n* v. *Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 568 (1st Cir. 1999) ("[*A*]*mici*, like respondents, can advise the Supreme Court of missing arguments."); *Swan* v. *Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993) (declining to address issue first raised by *amici* on appeal); *Molina* v. *INS*, 981 F.2d 14, 20 (1st Cir. 1992) (addressing issue first raised by *amici* on appeal); *Pinney Dock & Transp. Corp.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1454 n.11 (6th Cir. 1988) (addressing new issues raised by *amici* that were "similar to" issues presented by the parties).

than that of a traditional *amicus*. Metamora is composed of the "manufacturing industries that had contributed waste to [the] landfill." *Id.* at 318. "By Consent Decree following suit by the United States Environmental Protection Agency . . . the Metamora Group agreed to clean up the landfill and to hold the United States harmless from any claims arising from the cleanup." *Ibid.* (citation omitted). The Consent Decree thus plays a central role in the determination of who will pay any judgment entered in favor of petitioner in this case. Indeed, the position of the United States is that "any judgment against the United States would be passed on to the Metamora Group in accordance with the Consent Decree." *Ibid.*[6]

For that reason, Metamora has played a uniquely prominent role in virtually every aspect of this case. As counsel for the United States explained:

> [T]he Metamora [G]roup is in fact the silent giant or the big bear in the back of every room. Every time I respond to discovery, every time I need technical information, every time I go to work on the exhibits, I have to talk to the Metamora [G]roup, because it is their contractor [whose actions gave rise to the takings claim] and they have been doing the cleanup for a number of years and they have all the technical information.

John R. Sand & Gravel Co. v. *United States*, 60 Fed. Cl. 272, 275 (2004). Indeed, the United States did not oppose Meta-

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[6] To be sure, Metamora's liability would not follow automatically from a judgment in petitioner's favor. Metamora could attempt to persuade the court overseeing the consent decree not to impose liability by, for example, refusing to recognize a judgment of the Court of Federal Claims in favor of petitioner or by construing the Decree not to require Metamora to indemnify the United States.

mora's motion to intervene in the trial court proceedings, and Metamora was also invited to participate in early settlement negotiations between petitioner and respondent. *John R. Sand & Gravel Co.*, 143 F. App'x. at 318.

The Federal Circuit, in turn, indicated that Metamora should participate as an *amicus curiae* in the court of appeals. When the trial court denied intervention (principally on the ground that the request was made too late), Metamora appealed. In holding that the trial court had not abused its discretion in denying Metamora party status, the court of appeals stressed that its ruling was "without prejudice to the application of the Metamora Group to participate as *amicus curiae* in any appeal to this court of the decision on the merits" by the trial court. *Id.* at 319.

Second, the parties had fair notice of Metamora's argument concerning application of the statutory time limitation. Whether the parties have "fair notice and an opportunity to present their positions" is a weighty factor in entertaining arguments raised by *amici*. See *Day*, 547 U.S. at 210; see also *Granberry*, 481 U.S. at 131, 136. This Court has placed a premium on whether the issue was litigated in the lower court. "[Determining whether an issue has been passed on below is] essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . ." *Singleton*, 428 U.S. at 120 (quoting *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941)).[7] In this case, peti-

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[7] Likewise, in *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) (plurality decision), the Court addressed the retroactivity of a new rule that fairness in a jury selection required the proportional representation of races on a jury even though the issue was only raised by an *amicus*. In so doing, the Court stressed that the "*question is not foreign to the parties, who have addressed retroactivity* with re-

tioner and respondent litigated the issue at length in the trial court. Although Metamora's motion to intervene in the trial court was ultimately denied, it asserted a timeliness defense in its proposed Answer. As also noted *supra*, the issue was extensively briefed on appeal in the Federal Circuit after it was raised by Metamora as an *amicus*. Petitioner fully briefed the statutory time limitation question in its Reply Brief, see Plaintiff-Appellant Reply Br. 13-14, *John R. Sand & Gravel Co.* v. *United States*, 457 F.3d 1345 (Fed. Cir. 2006), and the parties addressed the issue at oral argument, Pet. App. 14a.

Third, and relatedly, petitioner was not unfairly prejudiced by consideration of Metamora's argument. See *Day*, 547 U.S. at 210 (identifying prejudice to the parties as a factor in entertaining arguments raised by *amici*); see also *Granberry*, 481 U.S. at 131, 136. Quite the opposite, petitioner vigorously argued against application of Section 2501 to its claim throughout the litigation. Nor could petitioner be surprised at Metamora's participation in the litigation and assertion of such arguments against relief, given Metamora's recognized and substantial interest in the outcome of the case. Equally importantly, as the court of appeals recognized, "the pertinent jurisdictional facts are not in dispute." Pet. App. 15a.

Fourth, "the interests of justice would be better served" by considering Metamora's argument that Section 2501 bars the suit as a matter of discretionary application. *Day*, 547 U.S. at 210. As noted *supra*, the interests of justice are served by having courts avoid questions that implicate sensitive constitutional concerns or principles of stare decisis. Beyond that, Metamora's arguments merit particular consid-

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spect to petitioner's *Batson* claim." *Id.* (citations omitted) (emphasis added).

eration given its substantial and direct interest in the litigation and its outcome. As noted, respondent contends that any judgment in the case must be paid by *amicus*. A rule precluding *amicus* from protecting its interests by raising meritorious defenses would allow parties to defend litigation only on grounds of their particular choosing (such as the merits of the takings claim here), safe in the knowledge that, if those defenses fail, the damages in the suit will be paid by a third party. The resulting prejudice to that third party, who would be saddled with liability for a money judgment without having an opportunity to have its arguments against liability considered, would be profoundly unjust and contrary to the public interest.

Petitioner argues that *Day*, 547 U.S. at 202, holds that "it would 'count' as an 'abuse of discretion' for a court to override a party's 'deliberate waiver of a limitations defense.'" Pet. Br. 47. That misreads *Day*. In fact, *Day* held only that the determination of whether to adjudicate a waived statute of limitations defense was a matter for the court's discretion. While the Court concluded in *Day* that it would be an "abuse of discretion" for a court to override a deliberate waiver in that case, it did not involve an argument raised by a party with a distinct and substantial interest in the outcome of the case. Moreover, petitioner's argument presumes that Section 2501's time limit is waivable, which, as explained *infra*, is not the case. *Day* simply has no application to Section 2501.

This Court should accordingly affirm or dismiss the writ as improvidently granted.[8]

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[8] At the very least, if this Court deems the limitations period non-jurisdictional, it should remand the case to the lower court with instructions to exercise its discretion whether to decide the issue. See *Granberry* v. *Greer*, 481 U.S. 129, 136 (1987) (vacating and remanding with instructions to exercise discretion where lower

II. SECTION 2501 IS A MANDATORY, JURISDICTIONAL LIMITATION ON THE FILING OF SUITS AGAINST THE UNITED STATES.

Should the Court choose to address the question whether Section 2501 is a limitation on federal court jurisdiction, the judgment of the court of appeals should be affirmed. This Court has repeatedly held that similar statutory limitations on the time within which cases must be filed in federal court are jurisdictional and, as the court of appeals properly recognized, that principle applies with particular force when the time limitation is also a condition on Congress's waiver of the United States' sovereign immunity.

A. THIS COURT'S DECISION IN *BOWLES* V. *RUSSELL* CONFIRMS THIS COURT'S REPEATED PRIOR HOLDINGS THAT SECTION 2501 LIMITS THE COURT OF FEDERAL CLAIMS' SUBJECT-MATTER JURISDICTION.

The Solicitor General has collected the numerous decisions of this Court holding that Section 2501 is jurisdictional and further that it is not subject to tolling for reasons other than those specified in the statute. See BIO 9-10 (citing *e.g.*, *Soriano* v. *United States*, 352 U.S. 270, 273-77 (1957)). Those repeated, consistent, and longstanding holdings fully comport with this Court's more recent jurisprudence.

Just four months ago, this Court held that the federal statute permitting a district court to reopen the time for filing a notice of appeal, see 28 U.S.C. 2107(c), is jurisdictional. *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007). In so holding, the

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court "made no attempt" to exercise its discretion); *Gray* v. *Netherland*, 518 U.S. 152, 166 (1996) (remanding to court of appeals to determine whether issue was properly raised).

Court relied on its "longstanding treatment of statutory time limits for taking an appeal as jurisdictional." *Id.* at 2364. "[I]t is indisputable," this Court explained, "that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century." *Id.* at 2364 n.2; see *Scarborough* v. *Pargoud*, 108 U.S. 567, 568 (1883) ("[T]he writ of error in this case was not brought within the time limited by law, and we have consequently no jurisdiction."); *United States* v. *Curry*, 47 U.S. 106, 113 (1848) ("[A]s this appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.").

The Court further explained that the longstanding treatment of statutory time limitations as jurisdictional was proper because the "time limitation is set forth in a statute" enacted by Congress. *Bowles*, 127 S. Ct. 2364. This is because the Constitution charges Congress with establishing the jurisdiction of federal courts, U.S. Const. art. III, § 1, and Congress's power to decide *what* cases federal courts can hear necessarily includes the corollary power to decide *when* cases may be heard. *Id.* at 2365. The Court explained:

> Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. *Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.* Put another way, *the notion of* "subject-matter" jurisdiction obviously extends to "classes of cases . . . falling within a court's adjudicatory authority," *but it is no less "jurisdictional"* when Congress forbids federal courts from adjudicating an otherwise legitimate "class of cases" after a certain period has elapsed from final judgment.

Id. at 2365-66 (emphasis added) (internal quotation marks and citations omitted).

The fact that a time limitation on the filing of litigation is set forth by Congress as a statutory limitation is thus of critical "jurisdictional significance." *Id.* at 2364 n.2. Indeed, when Congress statutorily constrains the filing of suits in federal court, the courts have "no authority" to expand their own jurisdiction by "creat[ing] equitable exceptions to jurisdictional requirements." *Id.* at 2366.[9]

Section 2501, like the statutory provision at issue in *Bowles*, is a statutory component of Congress's determination of "when, and under what conditions," the Court of Federal Claims has the authority to hear cases. *Id.* at 2365-66. While *Bowles* addressed a statutory time limit for initiating appellate litigation, the Court's reasoning equally embraces the initiation of litigation in a trial court. Indeed, there is no sound basis for distinguishing the two situations. As *Bowles* acknowledged, "Congress decides whether federal courts can hear cases *at all*," and that authority necessarily encompasses "when, and under what conditions" trial courts may hear cases, as much as appellate courts. *Id.* at 2365 (emphasis added). Indeed, *Bowles* reasoned that "the notion of 'subject-matter' jurisdiction obviously extends to 'classes of cases . . . falling within a court's adjudicatory authority,'" *id.* (quoting *Eberhart* v. *United States*, 546 U.S. 12, 16 (2005) (per curiam), including – but certainly not limited to – appellate litigation, *id.* at 2365-66 (explaining that the jurisdictional bar applies "no less" to appeals than to other "'classes of cases'

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[9] For that reason, the Court in *Bowles* overruled *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam), which had previously held that federal courts could apply a "unique circumstances" exception to equitably extend Section 2107(c)'s time limit.

falling within the courts' adjudicatory authority") (quoting *Eberhart*, 546 U.S. at 16). See also *Kontrick* v. *Ryan*, 540 U.S. 443, 453 & n.8 (2004) (explaining that the time limit governing the initial filing of tort claims against the United States is jurisdictional) (cited in *Bowles*, 127 S. Ct. at 2364-65).

Petitioner has identified no sound basis for departing in this case from *Soriano*, *Bowles*, and the related decisions of this Court. Indeed, judicial restraint in changing course should be particularly heightened in this context for three reasons. First, as the Solicitor General explains, Section 2501 is a limitation and condition on Congress's waiver of the United States' sovereign immunity. Waivers of sovereign immunity must be narrowly construed. See BIO 10. Second, courts should be especially hesitant to revisit or modify precedent when the result would be to expand the court's jurisdiction. The constitutional separation of powers does not permit such judicial self-help, and accordingly any decision to displace a longstanding jurisdictional bar should be undertaken only with the clearest congressional direction. See *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 1854, 1867 (2006) ("With federal courts thus deciding issues they would not otherwise be authorized to decide, the 'tripartite allocation of power' that Article III is designed to maintain would quickly erode[.]") (citations omitted); *Snyder* v. *Harris*, 394 U.S. 332, 341-42 (1969) ("If there is a present need to expand the jurisdiction of [federal] courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts."); *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (explaining "the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes"). There is no such congressional direction here. Third, judicial restraint is particularly appro-

priate when – as here – the question to be adjudicated implicates the constitutionality of the actions of a coordinate branch of government. See *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State*, 454 U.S. 464, 474 (1982) (adjudicating the constitutionality of coordinate branches' acts "has been recognized as a tool of last resort"); *Coleman* v. *Miller*, 307 U.S. 433, 463-64 (1939) (opinion of Frankfurter, J.) ("The scope and consequences of our doctrine of judicial review over executive and legislative action should make us observe fastidiously the bounds of the litigious process within which we are confined.").[10]

In short, the conclusion that Section 2501 is jurisdictional is compelled by this Court's precedent addressing both Section 2501 itself and related statutory limitations on the initiation of litigation.

B. PETITIONER'S ATTEMPTS TO DISTINGUISH THIS COURT'S PRECEDENT ARE UNAVAILING.

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[10] The constitutional nature of a claim brought against the United States does not undermine *Bowles*'s applicability to Section 2501, which limits the Court of Federal Claims' authority to hear, among other things, claims founded upon the United States Constitution. 28 U.S.C. 1491(a)(1). Petitioner's underlying claim in this matter is a constitutional claim. Congress, however, is empowered to statutorily restrict the jurisdiction of courts to hear constitutional claims by imposing time limitations. See, *e.g.*, *California* v. *Arizona*, 440 U.S. 59, 65 (1979) (observing that even the Court's original, "self-executing" jurisdiction under the Constitution is subject to terms of the government's waiver of sovereign immunity); *Block* v. *North Dakota*, 461 U.S. 273, 292 (1983) ("[a] constitutional claim can become time-barred just as any other claim can") (citing *Soriano* and *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980)).

Petitioner contends that other decisions of this Court's decisions establish that Section 2501 is not jurisdictional. Pet. Br. 33-37. Petitioner, however, misunderstands the import of those decisions, none of which (unlike *Soriano* and the other precedents cited by the Solicitor General) addressed Section 2501 itself.[11]

Petitioner places particularly heavy reliance on *Day* v. *McDonough*, 547 U.S. 198 (2006), which is properly distinguished. In *Day*, this Court held that federal courts were

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[11] *Kontrick* involved a "procedural rule[] adopted by the Court for the orderly transaction of its business," rather than a congressionally enacted statutory time limitation on federal court jurisdiction. *Bowles*, 127 S. Ct. at 2364 (citing *Kontrick*, 540 U.S. at 454)). Although *Kontrick* read the word "jurisdictional" to refer to those "prescriptions delineating the classes of cases (subject-matter jurisdiction) and the person (personal jurisdiction) falling with a court's adjudicatory authority," *id.* at 456, *Bowles* made clear that *Kontrick*'s definition of "jurisdictional" was not exhaustive, concluding that "it is no less 'jurisdictional' when Congress forbids federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment." 127 S. Ct. at 2366. Moreover, *Kontrick* even recognized that the time limit governing the initial filing of tort claims against the United States, analogous to Section 2501, is jurisdictional within the meaning ascribed to that term in *Kontrick*. 540 U.S. at 454.

Scarborough v. *Principi*, 541 U.S. 401 (2004), involved a time limit not on initiating litigation, but on filing an application for attorney's fees at the end of a case. The time limit thus "relate[d] only to postjudgment proceedings auxiliary to cases already within [the] court's adjudicatory authority," *id.* at 414, and thus did not concern the court's subject matter jurisdiction over the action because it was "ancillary to [a] judgment" that already had been properly issued within the court's jurisdiction. *Bowles*, 127 S. Ct. at 2365 (quoting *Scarborough*, 541 U.S. at 412)).

permitted, but not required, to raise the one-year time limitation on habeas corpus petitions in 28 U.S.C. 2244(d)(1)(A). 547 U.S. at 209. This Court explained, however, that a time limitation in the habeas context, like other threshold habeas defenses – exhaustion of state remedies, procedural default, and nonretroactivity – operated to "implicat[e] values beyond the concerns of the parties" which permitted a district court to invoke "considerations of comity, finality, and the expeditious handling of habeas proceedings" in support of the historically (and constitutionally) unique equitable power of a court in habeas corpus. *Id.* at 205, 208 (citations omitted). Given the distinct constitutional status of the Great Writ, U.S. Const. art. I, § 9, principles governing the authority of courts to review the detention of individuals do not translate readily to the general civil litigation context – a fact underscored by *Bowles*'s silence on that subject. See *INS* v. *St. Cyr*, 533 U.S. 289, 311-12 (2001) (explaining general differences between habeas corpus and judicial administrative review, and requiring extraordinarily express congressional statements to impair the writ).

In addition to being limited to the unique considerations applicable to habeas corpus proceedings, the decision in *Day* involved a statute that explicitly "call[ed] for the forfeiture rule" by containing the language "[a] 1-year *period of limitation*." 547 U.S. at 213 (Scalia, J., dissenting) (emphasis in original). In contrast, Section 2501 contains no such language. Moreover, unlike the statute at issue in *Day*, which concerns proceedings in which the federal government is not a defendant, Section 2501 is an integral component of the United States' waiver of sovereign immunity. *Day* is therefore simply not instructive in the context of Section 2501.

To the extent that *Day* is instead read to rule categorically that time limits for bringing suit in federal court are non-jurisdictional, that holding should be revisited in light of

Bowles. As explained above, *Day* concluded that a statute of limitations defense is not "jurisdictional" in the habeas corpus context, 547 U.S. at 204, whereas *Bowles* concluded that "it is no less 'jurisdictional' when Congress forbids federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed from final judgment." 127 S. Ct. at 2366. The decision in *Bowles* was more firmly rooted in this Court's precedent addressing time limitation issues than in *Day*. To the extent *Day* considered such precedent, it did so only in the context of habeas corpus, which places a distinct set of inherent powers and discretionary concerns within a federal court's ambit. Accordingly, this Court should reaffirm the firmly established principles identified in *Bowles* and conclude that the holding in *Day* adopts no categorical rule.

C. THE CONCLUSION THAT SECTION 2501 IS JURISDICTIONAL IS CONSISTENT WITH THIS COURT'S EQUITABLE TOLLING JURISPRUDENCE.

Contrary to petitioner's argument (Pet. Br. 12), the conclusion that Section 2501 is jurisdictional comports with this Court's equitable tolling decision in *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 94-96 (1990). In *Irwin*, this Court held that the time limit for filing a civil action against the federal government under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), is subject to equitable tolling in appropriate circumstances. While recognizing that prior precedent cautioned against permitting equitable tolling of statutes of limitation, the Court in *Irwin* concluded that, as a general matter, "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Irwin*, 498 U.S. at 95. The

Court accordingly held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. The Court stressed, however, that the presumption was meant to operate as "a realistic assessment of legislative intent," *id.* at 95, and that no equitable tolling would be available when the statutory text enacted by Congress indicates a contrary intent, *id.* at 96.

Petitioner contends (Pet. Br. 33-34) that *Irwin* precludes the conclusion that Section 2501 is jurisdictional. That is wrong for two reasons. First, the availability of equitable tolling says little about whether a time limit is jurisdictional. Rather, as *Irwin* indicates, the existence of equitable tolling is a distinct statutory construction inquiry that is undertaken both for jurisdictional and non-jurisdictional time limitations. Indeed, in *Irwin*, after the Court rejected the plaintiff's equitable tolling argument on the merits, the Court affirmed the court of appeals' dismissal of the case for lack of subject-matter jurisdiction. See *Irwin*, 498 U.S. at 95; see also *Irwin* v. *Veterans Admin.*, 874 F.2d 1092, 1096-97 (5th Cir. 1989). Congress's authority to decide whether and when federal courts may hear cases necessarily subsumes the power – if Congress so chooses – to vest courts with the authority to make equitable exceptions to a jurisdictional bar in extraordinary circumstances. The question, at bottom, remains one of statutory construction. Petitioner thus errs in assuming some fundamental incompatibility between a statute's potential susceptibility to equitable tolling and its jurisdictional status.

Moreover, there is no tension between the holdings of *Bowles* and *Irwin*, because the holding of both cases is the same – that "excusable neglect" does not excuse noncompliance with a statutory time limit. See *Bowles*, 127 S. Ct. at 2366 (overruling *Harris Truck Lines, Inc.* v. *Cherry Meat*

Packers, Inc., 371 U.S. 215 (1962), which had been based on a finding of "excusable neglect"); *Irwin*, 498 U.S. at 95 ("the principles . . . [justifying equitable tolling] do not extend to what is at best a garden variety claim of excusable neglect"). Rather, equitable tolling is available only in the rarest of circumstances. *Irwin*, 498 U.S. at 95 (noting that the courts "have typically extended equitable relief only sparingly," and recognizing only two circumstances where tolling might be appropriate).

Second, and in any event, Section 2501 is not subject to equitable tolling. That is what this Court held in *Soriano*. See 352 U.S. at 273-77; see also *Kendall*, 107 U.S. at 124-26. *Irwin* did not purport to overrule *Soriano* or any of its predecessor decisions. Nor does *Irwin*'s analysis cast doubt on *Soriano*'s holding. That is because *Irwin*'s rebuttable presumption is just that – a presumption about congressional intent that may be rebutted by contrary evidence. In fact, this Court has held twice since *Irwin* that equitable tolling is not applicable to a statutory time limit for filing claims against the Government "where it is inconsistent with the text of the relevant statute." *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998); see also *Young* v. *United States*, 535 U.S. 43, 49-50 (2002); *United States* v. *Brockamp*, 519 U.S. 347 (1997).[12]

The text of Section 2501 is incompatible with equitable tolling. *Irwin* itself acknowledged that the language in Section 2501 providing that "every claim . . . shall be barred unless the petition . . . is filed . . . within six years," 28 U.S.C. 2501, is far "more stringent" than the text of Title VII that was at issue in *Irwin*. 498 U.S. at 95; cf. 42 U.S.C.

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[12] The conclusion that Section 2501 is jurisdictional has been repeatedly confirmed by the Federal Circuit post-*Irwin*. See Pet. App. 16a, 18a (collecting cases).

2000e-16(c) (providing only that "within thirty days . . . an employee . . . may file a civil action").

Furthermore, when Congress wanted to create exceptions to Section 2501's jurisdictional bar, it said so explicitly. Section 2501 provides that "[a] petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases." 28 U.S.C. 2501. Adopting a general equitable tolling exception to Section 2501 thus "would be doing little more than overriding Congress' judgment as to when equity requires that there be an exception to the limitations bar," *United States* v. *Dalm*, 494 U.S. 596, 610 (1990), and would render the statutory tolling provision largely superfluous, contrary to established principles of statutory construction, including *expressio unius est exclusion alterius*. See *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) ("The rule against superfluities complements the principle that courts are to interpret the words of a statute in context."); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992) ("[C]ourts should disfavor interpretations of statutes that render language superfluous."). See also *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) ("The most natural reading of [15 U.S.C.] § 1681p is that Congress implicitly excluded a general discovery rule by explicitly including a more limited one") (citing *Leatherman* v. *Tarrant County Narcotics Intel. & Coord. Unit*, 507 U.S. 163, 168 (1993)).

That principle of statutory construction has been affirmed by this Court in the equitable tolling context. See *Beggerly*, 524 U.S. at 48 (noting that the language of 28 U.S.C. 2409(a), explicitly delaying accrual "until the plaintiff 'knew or should have known of the claim of the United States,' has already effectively allowed for equitable tolling"); *Brockamp*, 519 U.S. at 351 ("[26 U.S.C.] § 6511 sets forth explicit exceptions to its basic time limits, and those

very specific exceptions do not include 'equitable tolling'") (citing 26 U.S.C. 6511(d)).

Section 2501, moreover, applies only to suits against the federal government and thus does not implicate the concern for uniformity in construing and applying a single limitations provision to both public and private lawsuits. While the Court concluded in *Irwin* that Congress would not have intended the same statutory text to permit equitable tolling against one class of defendants (private parties) while foreclosing it against governmental defendants, see 489 U.S. at 95, construing Section 2501 consistent with its strict terms does not pose any such incongruity.

Dicta in *Scarborough* v. *Principi*, 541 U.S. 401 (2004), questioned the government's argument that *Irwin*'s rebuttable presumption is inapplicable to causes of action "that have no analogue in private litigation," and stated that "it is hardly clear that *Irwin* demands a precise private analogue." *Id.* at 422. The Court ultimately found that, in any event, there were private analogues to the fee-shifting statute at issue in *Scarborough*. *Id.* [13] As noted *supra*, however, *Scarborough* involved a question of ancillary jurisdiction over fee claims at the conclusion of litigation, and thus does not speak to time limits governing the commencement of litigation. Beyond that, the Court in *Scarborough* expressly declined to consider whether equitable tolling applied to the relevant

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[13] A claim seeking just compensation for property taken by the government is fundamentally distinct from any private cause of action relating to property. Even aside from the fact that the claim may, by definition, be brought only against the government, the government alone has the power to commit the act that triggers the right to just compensation: only the government is empowered to compel an involuntary transfer of property by taking it without consent and making payment. U.S. CONST. AMEND. V.

time limit, *id.* at 421 n.8, and, therefore, the scope of *Irwin* was not truly at issue.

In any event, the point is not that the absence of a "precise private analogue," *id.* at 422, by itself automatically renders a statute jurisdictional. Rather, the existence of equitable tolling remains a question of statutory construction, and the conclusion in *Irwin* that the meaning of statutory text does not change depending on which defendant is before the court can be considered relevant evidence of congressional intent to permit a uniform tolling rule. By the same token, the absence here of any such potential incongruity in the operation of a single limitations period or similarly worded limitations periods constitutes evidence weighing against the importation of tolling principles – especially when coupled with Section 2501's explicit limitation of tolling to certain specified circumstances. Therefore, a holding by this Court that Section 2501 is jurisdictional, consistent with its holding in *Bowles*, would not be in conflict with *Irwin*.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed or the writ of certiorari dismissed as improvidently granted.

Respectfully submitted,

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In The

Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to
The United States Court Of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

Page(s)

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. IN RESOLVING THE STATUTE OF LIMITATIONS QUESTION, THE COURT MUST CONSIDER ITS RIPENESS DOCTRINE FOR TAKINGS CLAIMS 4

A. Relationship Between Statute of Limitations and Ripeness 4

B. Ripeness Principles for Takings Claims 6

C. Petitioner's Physical Takings Claim did not Ripen Until it Sought Compensation Under the Tucker Act 9

II. THE COURT SHOULD DISPENSE WITH *WILLIAMSON*'S COMPENSATION PROCEDURES ELEMENT 11

A. Different Rule for Federal vs. State Takings ... 13

B. Discord on Simultaneous vs. Subsequent Takings Claims 14

C. Anomaly with Removal Jurisdiction 15

D. Federal Court Blockade on Takings Claims 16

TABLE OF CONTENTS (continued)

Page(s)

III. *WILLIAMSON* WILL CONTINUE TO GENERATE UNFAIR AND ARBITRARY RESULTS UNLESS THIS COURT INTERVENES 18

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott Labs. v. Gardner, 387 U.S. 136 (1976) 4

Agins v. City of Tiburon, 447 U.S. 255 (1980) 22

Agripost, Inc. v. Miami-Dade County, 195 F.3d 1225 (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000) 12

Atl. States Legal Found. v. EPA, 325 F.3d 281 (D.C. Cir. 2003) 5

Anderson v. Green, 513 U.S. 557 (1995) 4

Asociación de Subscripción Conjunto del Seguro de Responsabilidad Obligatorio v. Galarza, 484 F.3d 1 (1st Cir. 2007) 7

Bateman v. City of W. Bountiful, 89 F.3d 704 (10th Cir. 1996) 12

Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp., 522 U.S. 192 (1997) 5, 6

Blanchette v. Conn. Gen. Life Ins. Corps., 419 U.S. 102 (1974) 4

Buckley v. Valeo, 424 U.S. 1 (1976) 4

Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995) 5

TABLE OF AUTHORITIES (continued)

Page(s)

City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156 (1997) 15

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 8

City of New Pulaski Co. v. Mayor and City Council of Baltimore, 217 F.3d 840 (4th Cir. 2000) 11

County Concrete Corp. v. Town of Roxbury, 442 F.3d 159 (3d Cir. 2006) 12

Deniz v. Mun. of Guaynabo, 285 F.3d 142 (1st Cir. 2002) 12

DLX, Inc. v. Kentucky, 381 F.3d 511 (6th Cir. 2004) 17

Dolan v. City of Tigard, 512 U.S. 374 (1994) 17

First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304 (1987) 10

Friends of Marolt Park v. U.S. Dep't of Transp., 382 F.3d 1088 (10th Cir. 2004) 5

Forseth v. Vill. of Sussex, 199 F.3d 363 (7th Cir. 2000) 12

Greenfield Mills, Inc. v. Macklin, 361 F.3d 934 (7th Cir. 2004) 7, 8

TABLE OF AUTHORITIES (continued)

Page(s)

Hacienda Valley Mobile Home Estates v. City of Morgan Hill, 353 F.3d 651 (9th Cir. 2003).. 10

Henry v. Jefferson County Planning Comm'n, 34 Fed. Appx. 92 (4th Cir. 2002) 12

John R. Sand & Gravel Co. v. United States, 457 F.3d 1345 (Fed. Cir. 2006) 10

Johnson v. Sikes, 730 F.2d 644 (11th Cir. 1984) 5

Kelo v. City of New London, 545 U.S. 469 (2005)..... 19

Koscielski v. City of Minneapolis, 435 F.3d 898 (8th Cir. 2006) 16

Kottschade v. City of Rochester, 319 F.3d 1038 (8th Cir.), *cert. denied*, 540 U.S. 825 (2003) 12, 15

Levin v. City of Sheffield Lake, 637 N.E.2d 319 (Ohio 1994) 19

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005) 22

Luperini v. County of DuPage, 637 N.E.2d 1264 (Ill. App. 1994)..... 21

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TABLE OF AUTHORITIES (continued)

Page(s)

McNamara v. City of Rittman,
473 F.3d 633 (6th Cir. 2007), *cert. pet.* filed
May 9, 2007 (No. 06-1481) ..... 18 - 20

MiPro Homes, L.L.C. v. Mt. Laurel Twp.,
910 A.2d 617 (N.J. 2006), *cert. pet.* filed
Apr. 6, 2007 (No. 06-1345) 20

Monsanto v. Ruckleshaus, 467 U.S. 986 (1984) 9

Nat'l Park Hospitality Ass'n v. Dep't of Interior,
538 U.S. 803 (2003) 4, 5

Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351
(6th Cir. 1995) 5

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 8

Preseault v. I.C.C., 494 U.S. 1 (1989) 9

Pascoag Reservoir & Dam LLC v. Rhode Island,
337 F.3d 87 (1st Cir. 2003) 8

People ex rel. Pratt v. Rosenfeld,
77 N.E.2d 697 (Ill. 1948) 21

Peters v. Fair, 427 F.3d 1035 (6th Cir. 2005) 12

Reiter v. Cooper, 507 U.S. 258 (1993) 6

Reno v. Catholic Soc. Servs., 509 U.S. 43 (1993) 4

TABLE OF AUTHORITIES (continued)

Page(s)

Rockstead v. City of Crystal Lake, 486 F.3d 963 (7th Cir. 2007), *cert. pet.* filed June 25, 2007 (No. 06-1716) ..... 7, 20 - 22

Samaad v. City of Dallas, 940 F.2d 925 (5th Cir. 1991) 12

San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005) 3, 13, 14

Sandy Creek Investors, Ltd. v. City of Jonestown, 325 F.3d 623 (5th Cir. 2003) 16

Sinaloa Lake Owners Ass'n v. City of Simi Valley, 864 F.2d 1475 (9th Cir. 1989) 7, 8

Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998) 12

Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993) ... 12

Suburban Trails, Inc. v. N.J. Transit Corp., 800 F.2d 361 (3d Cir. 1986) 5

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 4, 6

Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) 18

TABLE OF AUTHORITIES (continued)

Page(s)

Toca Producers v. F.E.R.C.,
411 F.3d 262 (D.C. Cir. 2005) 5

Utah v. U.S. Dep't of Interior, 210 F.3d 1193
(10th Cir. 2003) 5

*Williamson County Reg'l Planning Comm'n
v. Hamilton Bank*, 473 U.S. 172 (1985) .....*passim*

Wilkinson v. Pitkin County Bd. of Comm'rs,
142 F.3d 1319 (10th Cir. 1998) 17

Statutes and Bills

28 U.S.C. § 1346(a)(2) 12

28 U.S.C. § 1441(a) 15

28 U.S.C. § 1491 ..... 9, 12

28 U.S.C. § 2501 ..... 2, 6, 11

Private Property Rights Implementation Act of 1997,
H.R. 1534, 105th Cong., 1st Sess. (1997) 23

Private Property Rights Implementation Act of 2000,
H.R. 2372, 106th Cong., 2d Sess. (2000) 23

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H.R. 4772, 109th Cong., 2d Sess. (2006) 24

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Page(s)

Other

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J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of San Remo Hotel —The Supreme Court Relegates Federal Takings Claims to State Courts,* 33 B.C. Envtl. Aff. L. Rev. 247 (2006)..... 16

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Madeline J. Meacham, *The Williamson Trap,* 32 Urb. Law. 239 (2000)..... 15, 16

TABLE OF AUTHORITIES (continued)

Page(s)

Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37 (1995) 14

Testimony of Prof. Daniel Mandelker on H.R. 1534, Before H. Comm. on the Judiciary, Subcomm. on Courts and Intellectual Property, *reprinted in* 31 Urb. Law. 371 (1999) 16

INTEREST OF THE *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this *amicus curiae* brief supporting Petitioner.[1] NAHB represents over 235,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, and historically has been, vitally concerned with judicial decisions regarding government regulation and taking of private property.

NAHB appeared before the Court as a petitioner in a case decided earlier this term concerning the Clean Water and Endangered Species Acts, *NAHB v. Defenders of Wildlife*, 551 U.S. ___, 127 S.Ct. 2518 (2007). It has also participated as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs.[2]

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[1] Letters of consent are on file with the Clerk. Pursuant to Rule 37.6 of this Court, NAHB states that its counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

[2] These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v.*

In particular, NAHB has frequently asked this Court to clarify procedural and jurisdictional issues so Fifth Amendment takings claims can be resolved on their merits. Too often, ripeness principles and statutes of limitations are misapplied to operate as an unfair bar, denying land owners full and fair court access on constitutional takings claims. NAHB thus offers its experience in this field and a national perspective to support the Petitioner.

SUMMARY OF ARGUMENT

Amicus agrees with Petitioner that the six-year limitations provision in the Tucker Act, 28 U.S.C. § 2501, is not a prerequisite for subject matter jurisdiction in the Court of Federal Claims. The court of appeals should thus

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City of San Jose, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 5[illegible] U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S.Ct. 1843 (2006); and *Rapanos v. United States*, 126 S.Ct. 2208 (2006).

be reversed in holding that the statute of limitations question could be raised *sua sponte*.

Even more fundamentally, *amicus* urges that under this Court's takings precedent, particularly *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), Petitioner's physical takings claim against EPA was never ripe until compensation was sought under the Tucker Act. Hence, the statute of limitations could not have run prior to the time the physical takings claim became ripe. As ripeness is unquestionably jurisdictional, this point can be considered *sua sponte*.

Amicus recognizes the tautology to maintain that Petitioner's takings claim did not ripen until Petitioner filed suit to compensate for EPA's taking. But that odd result is required under the current state of the case law. The ripeness requirement articulated by *Williamson* — that a Fifth Amendment takings claim does not ripen until the aggrieved property owner pursues an available compensation remedy — has generated multiple inconsistencies within this Court's own Fifth Amendment jurisprudence. Four concurring Justices in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), stated that *Williamson* "may have been mistaken," and that "[i]t is not clear that *Williamson County* was correct in demanding" that a claimant must first seek a compensation remedy through litigation as a prerequisite to ripen a Fifth Amendment takings claim. *Id.* at 340 (Rehnquist, C.J., concurring). Respectfully, NAHB encourages this Court to reconsider the compensation element of *Williamson*'s ripeness doctrine — and prospectively dispense with it.

ARGUMENT

I. IN RESOLVING THE STATUTE OF LIMITATIONS QUESTION, THE COURT MUST CONSIDER ITS RIPENESS DOCTRINE FOR TAKINGS CLAIMS.

Amicus agrees with Petitioner that 28 U.S.C. § 2501 does not impose jurisdictional requirements. However, if the court of appeals is affirmed and the limitations question may be raised *sua sponte*, then the Court should consider the effect of its ripeness doctrine on the timeliness of Petitioner's takings claim.

A. Relationship Between Statute of Limitations and Ripeness.

"[R]ipeness is peculiarly a question of timing." *Anderson v. Green*, 513 U.S. 557, 559 (1995). See also *Buckley v. Valeo*, 424 U.S. 1, 113-114 (1976); *Blanchette v. Conn. Gen. Life Ins. Corps.*, 419 U.S. 102, 139 (1974). "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements ....' " *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-149 (1967)). While the undecided question in this case is whether 28 U.S.C. § 2501 goes to subject matter jurisdiction, it is well established that ripeness doctrine is "drawn from both Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 807. See also *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 732 n. 7 (1997); *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57 n. 18 (1993). The ripeness

doctrine has been described as "arising from problems of prematurity and abstractness that may present insurmountable obstacles to the exercise of the court's jurisdiction, even though jurisdiction is technically present." *Johnson v. Sikes*, 730 F.2d 644, 648 (11th Cir. 1984).

Because ripeness is jurisdictional, it can be raised at any point in the litigation. "[E]ven in a case raising only prudential concerns, the question of ripeness may be considered on a court's own motion." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 807. The circuit courts thus uniformly hold that ripeness questions can be addressed *sua sponte*.[3] In short, the Court at its own volition is free to consider the ripeness of Petitioner's physical takings claim.

Moreover, "[t]he standard rule [is] that the limitation period commences when the plaintiff has 'a complete and present' cause of action ... [A] cause of action does not become 'complete and present' until the plaintiff can file suit and obtain relief." *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997) (citations omitted). Unless legislative text clearly indicates otherwise, it is generally *not* the case that "a statute of limitations could commence to run on one day while the right to sue ripened on a later date." *TRW Inc. v.*

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[3] See, *e.g.*, *Toca Producers v. F.E.R.C.*, 411 F.3d 262, 265-266 n.* (D.C. Cir. 2005); *Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1093 (10th Cir. 2004); *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003); *Utah v. U.S. Dep't of Interior*, 210 F.3d 1193, 1196 n.1 (10th Cir. 2000); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1361 (6th Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1523-24 (11th Cir. 1995); *Suburban Trails, Inc. v. N.J. Transit Corp.*, 800 F.2d 361, 365 (3d Cir. 1986).

Andrews, 534 U.S. 19, 34 n. 6 (2001) (interpreting *Bay Area Laundry*). See also *Reiter v. Cooper*, 507 U.S. 258, 267 (1993) ("While it is theoretically possible for a statute to create a cause of action that accrues at one time for purposes of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute").

There is nothing in the Tucker Act — and certainly no language in the Fifth Amendment — to support a conclusion that the six-year period in 28 U.S.C. § 2501 ran out prior to the ripening point of Petitioner's physical takings claim against the United States. However, as explained below, the court of appeals has effectively decided just that: the limitations provision at issue expired before Petitioner could even sue the United States for a physical invasion. In light of this "odd result," there is ample justification for the Court to consider the ripeness question *sua sponte*.

B. Ripeness Principles for Takings Claims.

"There are two independent prudential hurdles" to ripen a regulatory takings claim. *Suitum*, 520 U.S. at 733-34. These were established in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). First, takings claims are not ripe "until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." 473 U.S. at 191. This "finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury ...." *Id.* at 193. This Court has never considered whether finality is

necessary to ripen a physical takings claim of the sort Petitioner brings. However, all of the courts of appeals reaching the issue have concluded that a separate finality inquiry is *not* necessary when the taking occurs by physical invasion.[4]

Second, *Williamson* held that a takings claim "is not yet ripe" if the property owner failed to seek an award of just compensation through available procedures. *Id.* at 194. The Court divined this "compensation procedures" element of ripeness because "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Ibid.* "[B]ecause the Fifth Amendment proscribes takings *without just compensation,* no constitutional violation occurs until just compensation has been denied." *Id.* at 184 n. 13 (original emphasis). As Judge Posner recently wrote, "the Constitution is not violated until the government refuses to compensate the owner." *Rockstead v. City of Crystal Lake,* 486 F. 3d. 963, 965 (7th Cir. 2007), *cert. pet.* filed June 25, 2007 (No. 06-1716). Unlike rulings with regard to finality (*supra* n. 4), circuits addressing the issue have decided that *Williamson*'s

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[4] See *Asociación de Subscripción Conjunto del Seguro de Responsabilidad Obligatorio v. Galarza,* 484 F.3d 1, 15 (1st Cir. 2007) ("[T]he finality prong of *Williamson County* is inapplicable to physical takings"); *Greenfield Mills, Inc. v. Macklin,* 361 F.3d 934, 958 (7th Cir. 2004) ("[A] physical invasion constitutes a 'final decision' and thus satisfies *Williamson County*'s first requirement"); *McKenzie v. City of White Hall,* 112 F.3d 313, 316 (8th Cir. 1997) ("A physical taking is by definition a final decision for the purpose of satisfying *Williamson*'s first requirement"); *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 864 F.2d 1475, 1478 (9th Cir. 1989) ("*Williamson County*'s final decision requirement is inapplicable in cases of physical invasion").

compensation procedures element is indeed a necessary prerequisite to ripen a physical takings claim.[5]

This Court has recognized that a *regulatory* takings challenge "does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation[6] claim alleging a regulatory taking cannot be maintained." *Palazzolo v. Rhode Island,* 533 U.S. 606, 628 (2001). The same must hold true for *physical* takings. Under *Williamson* and the current governing case law, a Fifth Amendment claim based on government invasion cannot mature, and thus the applicable limitations period cannot expire, until the affected property owner has satisfied the compensation procedures element.

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[5] *Greenfield Mills, supra* n. 4, 361 F.3d at 958 (physical takings claim "is subject only to *Williamson*'s exhaustion requirement."); *Pascoag Reservoir & Dam LLC v. Rhode Island,* 337 F.3d 87, 91-92 (1st Cir. 2003) ("the state action requirement remains in physical taking cases: '[C]ompensation must first be sought from the state if adequate procedures are available'."); *McKenzie, supra* n. 4, 112 F.3d at 317 ("As for the second *Williamson* requirement, the plaintiff must seek compensation from the state before proceeding to federal court if adequate state procedures are available, even in a physical taking case."); *Sinaloa Lake Owners Ass'n, supra* n. 4, 864 F.2d at 1479 ("Even in physical taking cases, compensation must first be sought from the state if adequate procedures are available.").

[6] Inverse condemnation occurs when the "government [defendant] takes the land at issue without initiating condemnation proceedings," such as by regulation or unconsented physical occupation. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 712 (1999).

C. Petitioner's Physical Takings Claim did not Ripen Until it Sought Compensation Under the Tucker Act.

The following passage from *Williamson* is particularly relevant:

> [W]e have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491.

Williamson, 473 U.S. at 194 (citing, *inter alia*, *Monsanto v. Ruckleshaus*, 467 U.S. 986, 1016-1020 [1984]).[7] See also *Preseault v. I.C.C.*, 494 U.S. 1, 16-17 (1989) (failure to use Tucker Act remedy rendered premature a takings claim against an Interstate Commerce Commission order converting abandoned rail lines to recreational trail use).

Williamson thus contemplated the precise scenario presented in the case at bench. Here, the physical takings claim against the United States did not ripen (thus, the Court of Federal Claims lacked subject matter jurisdiction) until Petitioner "availed itself of the process provided by the Tucker Act" *in that court*. Under *Williamson*, the very act of filing the Tucker Act suit ripened Petitioner's claim for just compensation against EPA.

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[7] *Monsanto* held that that a takings claim was not ripe because the applicant for a pesticide registration did not seek a Tucker Act compensation remedy from EPA, to redress any monetary damage that might arise under the Federal Insecticide, Fungicide, and Rodenticide Act. 467 U.S. at 1019-20.

The court of appeals' ruling that the statute of limitations began to run in 1994, when EPA built the fence that cut off access to Petitioners' plant,[8] cannot be reconciled with *Williamson*, which requires resort to federal compensation procedures to yield jurisdictional ripeness. Accordingly, the date of the physical appropriation — that is, EPA's fence construction — might be pertinent for *remedial purposes* to determine the amount of compensation that is ultimately due. But the government's invasion did not itself ripen the physical takings claim for *jurisdictional purposes*, which only occurred later when Petitioner invoked the Tucker Act's compensation procedures. See *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 320 n. 10 (1987) ("Though, as a matter of law, an illegitimate taking might not occur until the government refuses to pay, the interference that effects a taking might begin much earlier, and compensation is measured from that time").

And, of course, if the physical takings claim was not ripe until Petitioner sought compensation through the Tucker Act, the statute of limitations could not have expired *before* then because the Court of Federal Claims did not have jurisdiction *until* then. Cf. *Hacienda Valley Mobile Home Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003) (in resolving facial takings claims "the court must perform a two-step analysis. First, it must determine whether the claim is ripe under *Williamson County*. Then the court must determine whether the claim

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[8] "We conclude ... that the claim accrued not later than February of 1994 when the government constructed the fence that cut of JRS & G's access to its plant area. That date was more than six years before JRS & G filed its complaint on May 20, 2002." *John R. Sand & Gravel Co.v. United States*, 457 F.3d 1345, 1356 (Fed. Cir. 2006).

is barred by a statute of limitations."); *City of New Pulaski Co. v. Mayor and City Council of Baltimore*, 217 F.3d 840, 843 (4th Cir. 2000) ("[A] takings claim is not ripe and the statute of limitations does not begin to run, unless the property owner has exhausted any available ... compensation procedures.").

To conclude, the court of appeals erred in ruling that the six-year limitation provision in 28 U.S.C. § 2501 ran out against Petitioner, because this Court's current precedent would not render the physical takings claim ripe until compensation was sought under the Tucker Act.

II. THE COURT SHOULD DISPENSE WITH *WILLIAMSON*'S COMPENSATION PROCEDURES ELEMENT.

Amicus fully recognizes the *reductio ad absurdum* to maintain that a property owner must bring a Tucker Act suit as a prerequisite to ripen a Tucker Act suit.[9] But that is the outcome that *Williamson* dictates. With respect, the problem lies within the compensation procedures requirement. It is inherently flawed. The Court should reconsider this prudential element of the ripeness inquiry and retire it, from this point forward.

The Tucker Act provides jurisdiction over cases such as the present one, seeking monetary relief from the federal

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[9] See Michael Berger, *Anarchy Reigns Supreme*, 29 Wash. U. J. Urb. & Contemp. L. 39, 57-58 (1985) (the discussion in *Williamson*, 473 U.S. at 194 (*supra* p. 9), that federal takings claims are premature until the Tucker Act remedy is sought in the Court of Federal Claims, is "bewildering" and "mystifying").

government in excess of $10,000.[10] The result that *Williamson* demands in this case is problematic, but difficulties with the compensation procedures element are far more common in takings suits against counties, townships, and other non-federal government entities. In such suits, virtually every court of appeals has interpreted *Williamson* to mean that a Fifth Amendment takings claim is not ripe — it does not exist — until a property owner has filed suit for inverse condemnation in state court and has been denied compensation. The justification behind these cases is that the government has not denied compensation until the property owner has litigated and lost his takings claim in court.[11]

This Court's avowed basis for the compensation procedures element is that "no constitutional violation

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[10] 28 U.S.C. § 1491(a). For suits seeking monetary relief from the federal government up to and including $10,000, the United States district courts also possess jurisdiction. 28 U.S.C. § 1346(a)(2).

[11] *Deniz v. Mun. of Guaynabo*, 285 F.3d 142, 146 (1st Cir. 2002); *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 99-100 (2d Cir. 1992), *cert denied*, 507 U.S. 987 (1993); *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 168 (3d Cir. 2006); *Henry v. Jefferson County Planning Comm'n*, 34 Fed. Appx. 92, 96 (4th Cir. 2002); *Samaad v. City of Dallas*, 940 F.2d 925, 933-36 (5th Cir. 1991); *Peters v. Fair*, 427 F.3d 1035, 1038 (6th Cir. 2005); *Forseth v. Vill. of Sussex*, 199 F.3d 363, 368-73 (7th Cir. 2000); *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041(8th Cir.), *cert. denied*, 540 U.S. 825 (2003); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 405-07 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998); *Bateman v. City of W. Bountiful*, 89 F.3d 704, 708-09 (10th Cir. 1996); *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225, 1234 (11th Cir. 1999), *cert denied*, 531 U.S. 815 (2000).

occurs until just compensation has been denied." *Williamson*, 473 U.S. at 184 n. 13. Surely, if *Williamson* is correct in requiring litigation to pursue compensation procedures, its application must not randomly depend on which level of government committed the taking. How could it be, that litigation against a state or local agency is necessary to ripen a takings claim but litigation against a federal agency is not required — if the declared reason for the procedure element depends on a court's denial of compensation? If *Williamson* is good law and its ripeness rule indeed entails exhaustion of litigation, then neither the level of government that has taken the property nor the court system in which suit must be pursued, should matter.

In 2005, former Chief Justice Rehnquist wrote a concurrence joined by three other Justices, stating that *Williamson*'s compensation procedures element has "created some real anomalies, justifying our revisiting the issue." *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 342 (2005) (Rehnquist, C.J., concurring). This concurrence stated "our decision in *Williamson* ... may have been mistaken," because "[it] is not clear ... that *Williamson* ... was correct in demanding that ... [a takings] claimant must seek compensation in state court before bringing a federal takings claim in federal court." *Id.* at 340. The confusion, inconsistencies, and "real anomalies" created by *Williamson* have gone on long enough. Lower courts, property owners, and government defendants all require clarification from this Court due to the following problems generated by *Williamson*:

A. Different Rule for Federal vs. State Takings.

If the court of appeals is upheld, a special exception to *Williamson* will have been created for federal government

takings. If the Court affirms that Petitioner's action is time-barred under 28 U.S.C. § 2501, it would be tantamount to ruling that takings claims against the United States are immediately ripe upon a final federal agency decision (or, in the case of physical takings, upon the invasion by a federal agency). The compensation procedures element would be rendered inapplicable in the context of federal government takings. In contrast, takings claims against local government will not ripen until after a state court denies compensation. But the Takings Clause provides no basis to vary ripeness requirements on the fortuity of whether the government "taker" is federal or state. *Supra* at 13. Does this Court intend to establish different ripeness requirements for federal, as compared to state, takings?

B. Discord on Simultaneous vs. Subsequent Takings Claims.

Tension is pronounced between *San Remo* and *Williamson*. *San Remo* held that takings plaintiffs can "simultaneously" bring federal and state takings claims in state court. *San Remo*, 545 U.S. at 338. Yet *Williamson* made clear that exhaustion of state compensation procedures is a necessary first step to ripen federal takings claims: "*until* [a plaintiff] has utilized [state] procedures, its takings claim is *premature*." *Williamson*, 473 U.S. at 197 (emphasis supplied). Moreover, every court of appeals interpreting *Williamson* (*supra* note 11) has decided that that initial exhaustion of state court compensation procedures is a ripening prerequisite for federal takings claims.[12] How can *San Remo* and *Williamson* be

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[12] Scholars agree. See, *e.g.*, Steven J. Eagle, Regulatory Takings 1062 (2d ed. 2001) ("the 'ripeness' metaphor is one that promises ultimate vindication."); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11

harmonized, if at all? How can a Fifth Amendment claim be brought simultaneously with a state takings claim in state court (*San Remo*), when that federal claim is not ripe until after state litigation is exhausted and the state court denies compensation (*Williamson*)?

C. Anomaly with Removal Jurisdiction.

In *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997), the Court allowed a municipal defendant to remove a federal takings claim from state to federal court, because "a case containing claims that local administrative action violates federal law ... is within the jurisdiction of the federal district courts." *Id.* at 163. Under the federal removal statute, a case can be removed from state to federal court only if it could have been brought in federal court *originally*. 28 U.S.C. § 1441(a). But under *Williamson*, federal courts do not have original jurisdiction over federal takings claims because they are not ripe until the property owner brings state litigation and loses. The Eighth Circuit believes that the ironic synergy between *College of Surgeons* and *Williamson* has created an "anomalous gap ... in Supreme Court jurisprudence." *Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir.), *cert. denied*, 540 U.S. 825 (2003). Does this Court intend a ripeness doctrine that prevents federal courts from deciding federal takings claims if they are initially filed in that forum by a plaintiff, but allows federal adjudication over such claims *only* when municipal defendants exercise their removal option to federal court?

J. Land Use & Envtl. L. 37, 67 (1995) (*Williamson*'s "language ... suggests that the state law is merely preparatory to a federal suit"); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239, 249 (2000) ("language ... of *Williamson* suggests that a federal claim will survive after disposition in the state court").

Moreover, municipal defendants have been permitted to remove federal takings cases from state to federal court, and once in federal court, argue that the claims should be dismissed for lack of a prior state ripening suit. See, *e.g.*, *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903-904 (8th Cir. 2006); *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003). Does this Court intend a ripeness regime that allows municipal defendants to whipsaw takings plaintiffs by removing them to federal court, and then bouncing them back to state court? How could that result possibly serve interests of judicial economy?

D. Federal Court Blockade on Takings Claims.

The interplay between *Williamson*'s compensation procedures element and the preclusion doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) has been well documented, and described as a "trap" that ensnares takings plaintiffs.[13] The problem is that once a takings claim is litigated in state court, claim or issue preclusion will *always* bar adjudication of the Bill of

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[13]The scholarship on this topic is legion. See, *e.g.*, J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of San Remo Hotel, The Supreme Court Relegates Federal Takings Claims to State Courts*, 33 B.C. Envtl. Aff. L. Rev. 247 (2006); Scott Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirements for Regulatory Takings Claims*, 85 Tex. L. Rev. 199 (2006); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239 (2000); Test. of Prof. Daniel Mandelker on H.R. 1534, Before the H. Comm. on the Judiciary, Subcomm. on Courts and Intellectual Property, *reprinted in* 31 Urb. Law. 371 (1999).

Rights provision protecting property rights in federal court. A case survey has confirmed that the merits of Fifth Amendment claims are largely undecided by federal judges. See John J. Delaney and Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse,* 31 Urb. Law. 203-205 (1999) (surveying all land-use takings cases with a federal court decision from 1990-1998). The Sixth Circuit appreciates the severity of the problem: "[The] interaction of *Williamson County*'s ripeness requirements and the doctrine of claim preclusion could possibly operate to keep every regulatory takings claimant out of federal court." *DLX, Inc. v. Kentucky,* 381 F.3d 511, 521 (6th Cir. 2004).

As the Tenth Circuit has observed, "[i]t is difficult to reconcile the [compensation procedures] ripeness requirement of *Williamson*" with issue and claim preclusion. *Wilkinson v. Pitkin County Bd. of Comm'rs,* 142 F.3d 1319, 1325 n. 4 (10th Cir. 1998). Accordingly, the only opportunities for federal court interpretations of the Takings Clause occur when either: (1) the United States is sued, and the matter goes to the Court of Federal Claims; or (2) this Court grants *certiorari* to review a decision from a state court of last resort. Does this Court intend to relegate the Fifth Amendment to the "status of a poor relation" (*Dolan v. City of Tigard,* 512 U.S. 374, 392 [1994]), by effectively barring the lower federal courts from adjudicating the merits of claims arising under the Takings Clause?

III. *WILLIAMSON* WILL CONTINUE TO GENERATE UNFAIR AND ARBITRARY RESULTS UNLESS THIS COURT INTERVENES.

"[C]onsiderations of fairness and justice" are at the heart of the Takings Clause. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 333 (2002). The plain truth is that *Williamson*'s compensation procedures element typically achieves results that are neither fair nor just, but arbitrary and irrational.

Two petitions for *certiorari* pending before this Court provide egregious illustrations of the "damned if you do, damned if you don't" dilemma confronting property owners as a result of *Williamson*. The first is *McNamara v. City of Rittman*, 473 F.3d 633, 637-40 (6th Cir. 2007), *cert. pet.* filed May 9, 2007 (No. 06-1481). In January 1994, the plaintiffs filed a state court action seeking damages for "unreasonable dewatering," a claim recognized by Ohio law, from water shortages caused by the city's well-drilling activity. In 1998, the Ohio intermediate appellate court affirmed dismissal of the dewatering claim on sovereign immunity grounds; in 1999, the Ohio Supreme Court dismissed plaintiffs' appeal as improvidently granted. 473 F.3d at 635. Plaintiffs could not assert state law takings theories in the state dewatering action, simply because the Sixth Circuit determined they were *not available* under Ohio law at the time the state suit was filed.[14]

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[14] "Ohio does not have an inverse condemnation or other direct, statutory cause of action for plaintiffs seeking just compensation for a taking." *McNamara*, 473 F.3d at 638. While Ohio does not allow a direct compensation remedy for a takings plaintiff through inverse condemnation, roughly six-months *after* the McNamara plaintiffs filed their state dewatering complaint, the

Subsequently, after exhausting the potential dewatering remedy in state court and not receiving a damages award there, in 2000 plaintiffs filed a federal court complaint for a Fifth Amendment taking. The Sixth Circuit refused to review the merits, dismissing the federal takings claim through a bizarre assemblage of statute of limitations and *Williamson* ripeness theories. The court decided that the applicable two-year statute of limitations under Ohio law rendered plaintiffs' 2000 federal takings case *too late* to redress "past violations" by the city. It ruled that the federal action was time-barred because the takings claim became "ripe for review in 1994" when the Ohio Supreme Court first recognized a mandamus action (*supra* n. 14) — *after* the state dewatering suit was filed. *McNamara*, 473 F.3d at 639. Then, with regard to Fifth Amendment takings arising from "continuing violations" of the city's on-going dewatering, the Sixth Circuit found the federal action *too early* because it was not preceded by an Ohio mandamus suit purportedly required by *Williamson*.[15] *Id.* at 639-40.

Ohio Supreme Court first announced the availability of a "'mandamus action to force appropriation proceedings' "— that is, a suit whereby a landowner can force government into eminent domain proceedings to affirmatively condemn the property at issue. *Ibid.* (citing *Levin v. City of Sheffield Lake*, 637 N.E.2d 319, 323-34 (Ohio 1994).

[15] Surely there are constitutional problems with a state law doctrine that does not simply require the land owner to seek just compensation from government, but forces the land owner into eminent domain proceedings to compel government to *actually take title* to the property at issue. The Court is aware that eminent domain cases create their own storm of controversy. See, *e.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005);

The court paid lip service to the Catch-22 situation it created for the plaintiffs, but nonetheless avoided federal adjudication on the Bill of Rights claim. It blamed *Williamson* for the result:

> It may seem a bit perverse that one takings claim (past violations) be barred by statute of limitations because it was delinquently filed in federal court, and yet a similar claim (continuing violations) be barred by ripeness because it was prematurely filed in federal court. But this is the nature of the federal-state interplay after *Williamson*, a dance made more awkward when actions, as here, both pre- and post-date the Ohio Supreme Court's decision [creating a mandamus remedy].

McNamara, 473 F.3d at 640. Thus, the takings plaintiffs were shut out of federal court.

Another petition, where hapless property owners find themselves trapped by *Williamson*, is pending in *Rockstead v. City of Crystal Lake*, 486 F.3d 963 (7th Cir. 2007) (Posner, J.), *cert. pet.* filed June 25, 2007 (No. 06-1716). Here, the takings claimants own a parcel adjacent to stormwater detention ponds and wastewater treatment facilities owned by the city. The city's management of these features caused flooding on plaintiffs' property, thereby converting "productive farmland into valueless wetlands." *Id.* at 965. Since 1948, Illinois case law has held that an inverse condemnation suit will *not* lie for damages from "intermittent flooding," and the plaintiffs thus lost their case at the state trial level. *Ibid* (citing

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MiPro Homes, L.L.C. v. Mt. Laurel Twp., 910 A.2d 617 (N.J. 2006), *cert. pet.* filed Apr. 6, 2007 (No. 06-1345).

People ex rel. Pratt v. Rosenfeld, 77 N.E.2d 697, 699-700 (Ill. 1948)).

The Rocksteads did not pursue further appeals in the Illinois courts because they saw "no point in continuing in state court because the outcome is foreordained by state law." *Ibid.* So, they filed a Fifth Amendment takings suit in federal court. But the Seventh Circuit deemed the suit unripe under *Williamson*. Judge Posner decided that further pursuit of state appeals could still provide a light at the end of the tunnel because judges "can—and do—change common law doctrines." *Id.* at 966. The Seventh Circuit saw a "glimmering of recognition" provided by a single 1994 state intermediate appellate decision that Illinois law could, after all of these years, change course to recognize an inverse condemnation claim due to intermittent flooding. *Id.* at 967 (citing *Luperini v. County of DuPage*, 637 N.E.2d 1264 (Ill. App. 1994)). Judge Posner thus concluded that the Rocksteads' federal takings claim was properly dismissed by the district court because they did not pursue state litigation to its ultimate appellate conclusion, as *Williamson* purportedly mandates. *Rockstead*, 486 F.3d at 965-66.

The *Rockstead* decision demonstrates just how extremely unfair *Williamson* works in practice. At least in the Seventh Circuit, takings plaintiffs are now expected to predict whether future state court opinions might possibly reverse earlier, long-standing precedent. And they need to be lucky, so that the stars align for a grant of *certiorari* from a state supreme court under its own procedural rules to accept review. For, if a takings plaintiff does not pursue litigation and appeals at all levels of the state system, they will never have the merits of their Fifth Amendment claim decided by *any* court. As Judge Posner stated, if "the

property owner goes through the entire state proceeding, and he loses, he cannot maintain a federal suit" due to *res judicata* and the doctrine against claim splitting. *Id.* at 968. In other words, [t]he litigation in state court is the end of the road" for property owners bringing Fifth Amendment claims. *Id.*

If this is what the Court thinks *Williamson* means – that federal courts are barred from deciding the merits of cases arising under the Takings Clause, unless the suit is against the United States – then it needs to announce that radical notion once and for all, in clear and unmistakable terms.

When particular takings principles prove over time that they make little sense, this Court has not hesitated to clarify the law even by overruling earlier cases. In *Lingle v. Chevron*, 544 U.S. 528, 531 (2005), the Court recognized that "[o]n occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase — however fortuitously coined." *Lingle* went on to hold that the "substantially advances a legitimate government interest" test first announced in *Agins v. City of Tiburon* (1980), was no longer "an appropriate test for determining whether a regulation effects a Fifth Amendment taking." *Lingle*, 544 U.S. at. 532. *Williamson* should be subject to the same kind of thorough examination. The compensation procedures element of the ripeness doctrine requires serious attention and reconsideration by this Court.

CONCLUSION

It is a droll understatement to say that *Williamson*'s compensation procedures element is "confusing" and

"controversial." Rarely has a legal doctrine been the object of so much enthusiastic invective:

> [T]he Supreme Court's decision in (and lower court applications of) *Williamson County* were described by courts and commentators as "odd," "unpleasant," "unfortunate," "ironic," "ill-considered," "unclear and inexact," "surprising," "bewildering," "worse than mere chaos," "dramatic," "misleading," "deceptive," an "anomaly," "paradoxical," "most confusing," a "source of intense confusion," "inherently nonsensical," "shocking," "absurd," "unjust," "self-stultifying," "pernicious," "revolutionary," "nonsense," "draconian," "riddled with obfuscation and inconsistency," "containing an Alice in Wonderland quality," and thereby creating "a procedural morass," a "labyrinth," "conflict of decision," a "result [that] makes no sense," "doctrinal confusion," "havoc," "a "mess," "a "trap," a "quagmire," a "Kafkaesque maze," a "fraud or hoax on landowners," a "weapon of mass obstruction," and "a Catch-22 for takings plaintiffs."

Michael Berger and Gideon Kanner, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence In Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 702-03 (Fall 2004) (citations omitted). On three occasions, the House of Representatives passed bill language to dispense with the compensation procedures element for takings claim ripeness.[16]

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[16] *See* H.R. 1534, The Private Property Rights Implementation Act of 1997, 105th Cong., 1st Sess. (1997) (passed by 248-178 vote on Oct. 22, 1997); H.R. 2372, Private Property Rights Implementation Act of 2000, 106th Cong., 2d. Sess. (2000)

Williamson is a like a virus. It mutates and infects a variety of dormant issues, such as statute of limitations provisions (and, likewise, principles of res judicata, collateral estoppel, concurrent jurisdiction, and removal jurisdiction, to name some others). Great clarity will be afforded to all of takings law if only this Court would heed Chief Justice Rehnquist's *San Remo* concurrence, and reconsider the propriety and validity of the compensation procedures element for jurisdictional ripeness.

For the foregoing reasons, the court of appeals should be reversed. And, *Williamson*'s compensation procedures requirement should be excised from this Court's body of Fifth Amendment jurisprudence.

August 3, 2007

Respectfully Submitted,

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(passed by 226-182 vote on March 16, 2000); H.R. 4772, Private Property Rights Implementation Act of 2006, 109th Cong., 2d Sess. (2006) (passed by 231-181 vote on Sept. 29, 2006).

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In the

Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether constitutional claims for just compensation under the Fifth Amendment are subject to sovereign immunity when the mandate of just compensation is self-executing.

2. Whether sovereign immunity is a legitimate basis for holding 28 U.S.C. § 2501 as jurisdictional.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. CONSTITUTIONAL CLAIMS FOR JUST COMPENSATION ARE NOT SUBJECT TO SOVEREIGN IMMUNITY 3

A. There Is No Sovereign Immunity from Fifth Amendment Takings Claims 3

B. The Just Compensation Clause of the Fifth Amendment Is Self-Executing 6

II. SOVEREIGN IMMUNITY IS NOT A LEGITIMATE BASIS JUSTIFYING A STRICT STATUTE OF LIMITATIONS IN TAKINGS CASES 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Alder v. United States, 785 F.2d 1004 (Fed. Cir. 1986) 4

Andalex Resources, Inc. v. United States, 54 Fed. Cl. 563 (2002) 6

Arnberg v. United States, 757 F.2d 971 (9th Cir. 1984), *cert. denied*, 475 U.S. 1010 (1986) 4

Caguas Cent. Fed. Sav. Bank v. United States, 215 F.3d 1304 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) 9

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 1

Cyprus Amax Coal Co. v. United States, 205 F.3d 1369 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001) 8

First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304 (1987) 6-8

Hair v. United States, 350 F.3d 1253 (Fed. Cir. 2003) 8

Henke v. United States, 60 F.3d 795 (Fed. Cir. 1995) 10

Hollister v. Benedict & Burnham Mfg. Co., 113 U.S. 59 (1885) 5

Hughes Communications Galaxy, Inc. v. United States, 26 Cl. Ct. 123 (1992), *overruled on other grounds*, 998 F.2d 953 (Fed. Cir. 1993), *reh'g denied* 4

TABLE OF AUTHORITIES—Continued

Page

Hurley v. Kincaid, 285 U.S. 95 (1932) 5

Irwin v. Dep't of Veterans Affairs, 498 U.S. 89 (1990) ... 10

Jacobs v. United States, 290 U.S. 13 (1933) 7

John R. Sand & Gravel Co. v. United States, 457 F.3d 1345 (Fed. Cir. 2006) 2-3

Leistiko v. Secretary of Army, 922 F. Supp. 66 (N.D. Ohio 1996) 8

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 1

Martinez v. United States, 333 F.3d 1295 (Fed. Cir. 2003) *cert. denied*, 540 U.S. 1177 (2004) 9

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 1

Palazollo v. Rhode Island, 533 U.S. 606 (2001) 1

T.O.F.C., Inc. v. United States, 683 F.2d 389 (Ct. Cl. 1982) 4

United States v. Causby, 328 U.S. 256 (1946) 4-5, 11

United States v. Clarke, 445 U.S. 253 (1980) 6-7

Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18 (1940) 5

United States Constitution

U.S. Const. amend. V, cl. 3 5

United States Statutes

28 U.S.C. § 1491(a)(1) 2, 5, 9-11

§ 2501 ..... 2-3, 9-11

TABLE OF AUTHORITIES—Continued

Page

Rules of Court

Ct. Fed. Cl. R. 8(c) 10

Sup. Ct. R. 37.3(a) 1

37.6 1

Miscellaneous

Berger, Eric, *The Collision of the Takings and Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493 (2006) 3

Grant, Eric, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144 (1996) 3, 5-6, 8-9

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Jackson, Vicki C., *Seductions of Coherence, State Sovereign Immunity and the Denationalization of Federal Law*, 31 Rutgers L.J. 691 (2000) 6

6 Nichols, P., *Eminent Domain* (3d rev. ed. 1972) 6

Tribe, Laurence H., *American Constitutional Law* (3d ed. 2000) 4

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) submits this amicus curiae brief in support of Petitioner John R. Sand & Gravel.[1] The parties have consented to the filing of this amicus curiae brief.

Founded almost thirty-five years ago, PLF is the largest and most experienced public interest legal foundation of its kind. PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has participated as amicus or lead counsel in previous cases involving the Takings Clause of the Constitution. *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Palazollo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF believes that the proposed brief amicus curiae will help this Court ascertain the constitutional limits of sovereign immunity.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Tucker Act, 28 U.S.C. § 1491(a)(1), provides the Court of Federal Claims with jurisdiction over takings claims brought against the United States. The statute of limitations applicable to suits in the Court of Federal Claims provides, in pertinent part:

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

28 U.S.C. § 2501 (2000). The Federal Circuit issued a decision holding that Section 2501 constitutes a jurisdictional limit on the authority of the Court of Federal Claims. The court relied upon case law that filing within the statute of limitations period was a condition of the government's waiver of sovereign immunity in the Tucker Act and thus must be strictly construed. *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354 (Fed. Cir. 2006). By doing so in a case involving the Takings Clause of the Fifth Amendment, the Federal Circuit has wrongly applied the doctrine of sovereign immunity to constitutional claims for just compensation. The Takings Clause is a limitation of sovereign immunity. Sovereign immunity cannot defeat the solid command of the Fifth Amendment in the context of suits to enforce the "just compensation" guarantee.

The Federal Circuit's strict jurisdictional view of the statute of limitations for Petitioner's takings claim cannot be based on the doctrine of sovereign immunity. Receiving just compensation under the Fifth Amendment's Taking Clause does not require an explicit waiver of sovereign immunity because the Constitutional Framers waived immunity when they adopted the Fifth Amendment.

Only this Court can correct the Federal Circuit's ruling and, by so doing, preserve property owners' constitutional right to seek just compensation.

ARGUMENT

I

CONSTITUTIONAL CLAIMS FOR JUST COMPENSATION ARE NOT SUBJECT TO SOVEREIGN IMMUNITY

A. There Is No Sovereign Immunity from Fifth Amendment Takings Claims

The Federal Circuit held below that the statute of limitations in 28 U.S.C. § 2501 is a jurisdictional requirement for a suit in the Court of Federal Claims. *John R. Sand*, 457 F.3d at 1354 (citations omitted). In reaching its decision, the Federal Circuit relied on cases holding that statutes of limitations for causes of action against the United States are attached by Congress as a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed. *John R. Sand & Gravel Co. v. United States*, 457 F.3d at 1354. The flaw in the Federal Circuit's holding is based on the premise that the government is categorically immune from suit for recovery of just compensation unless it consents to be sued. However, "[that] premise cannot withstand scrutiny, for the Just Compensation Clause of the Fifth Amendment works an abrogation of the government's immunity from suits resulting from takings of private property." Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144 (1996) (noting the Supremacy of the Just Compensation Clause); *see also* Eric Berger, *The Collision of the Takings and Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493 (2006) (arguing that the Takings Clause trumps sovereign immunity).

Although it may be the general principle that the United States cannot be sued without its consent, this principle does not apply to suits directly authorized by the Constitution, including suits such as the one in this case to recover just compensation for private property taken by the United States. *See Arnberg v. United States*, 757 F.2d 971, 980 n.7 (9th Cir. 1984), *cert. denied*, 475 U.S. 1010 (1986) ("Actions brought under the taking clause of the fifth amendment are, of course, an exception to the rule that sovereign immunity is a bar to damages against the United States for direct constitutional violations."); *See Alder v. United States*, 785 F.2d 1004, 1009 (Fed. Cir. 1986) (stating Fifth Amendment does not require a specific waiver of sovereign immunity because the Constitution has already achieved that popular right); *T.O.F.C., Inc. v. United States*, 683 F.2d 389, 393 (Ct. Cl. 1982) ("[T]he fifth amendment is an express waiver of sovereign immunity."); *see also* Laurence H. Tribe, *American Constitutional Law*, Section 6-38, at 1272-73 (3d ed. 2000) ("A sovereign immunity defense . . . may not be available against a takings challenge, because the Court has suggested . . . that the Fifth Amendment's Takings Clause trumps state (as well as federal) sovereign immunity."); *Hughes Communications Galaxy, Inc. v. United States*, 26 Cl. Ct. 123, 145 (1992), *overruled on other grounds*, 998 F.2d 953 (Fed. Cir. 1993), *reh'g denied*, ("the taking of property by the sovereign for public use, though unquestionably an act of sovereignty, does not, under our Constitution leave the sovereign immune from having to pay compensation for the taking").

Indeed, this Court has recognized that the Court of Claims has jurisdiction over takings claims. *See United States v. Causby*, 328 U.S. 256, 267 (1946).

> If there is a taking, the claim is "founded upon the Constitution" and within the jurisdiction of the Court of Claims to hear and determine.

Id. at 1068-69 (citing *Hollister v. Benedict & Burnham Mfg. Co.*, 113 U.S. 59, 67 (1885)); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932); *Yearsley v. W. A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940); *see also* 28 U.S.C. § 1491(a)(1) (2004) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded [] upon the Constitution . . . ."). Because this case involves a takings claim, the jurisdiction of the Court of Claims was clear and should not have been raised *sua sponte*.

Property owners enjoy the right to bring takings claims not by the government's consent, but by constitutional mandate. The Fifth Amendment declares that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V, cl. 3. Through the Fifth Amendment, government has promised to pay just compensation if a taking has occurred. Since the plain language of the Fifth Amendment mandates just compensation for anything that amounts to a taking, no immunity from the obligation to provide compensation can be reconciled with the Fifth Amendment.

> It is a proposition too plain to be contested that the Just Compensation Clause of the Fifth Amendment is too "repugnant" to sovereign immunity and therefore abrogates the doctrine in suits brought in response to takings of private property by the United States. A taking without payment of just compensation is a constitutional oxymoron. Faced with proof that the government has effectuated such a condition, a court must do one of two things if it is to enforce the supreme law of the land. Either it must oust the government and restore the property owner to possession of his or her property, or it must confirm the taking and exact just compensation from the government. Between these alternatives, both of

> which abrogate sovereign immunity, there is no middle ground.

Grant, 91 Nw. U. L. Rev. at 200; *see also Andalex Resources, Inc. v. United States*, 54 Fed. Cl. 563, 568 (2002) (noting it is the "absolute and affirmative requirement" of the Takings Clause that fully waives sovereign immunity under the Takings Clause of the Fifth Amendment).

Sovereign immunity does not apply to a suit founded under the Just Compensation Clause of the Fifth Amendment.

B. The Just Compensation Clause of the Fifth Amendment Is Self-Executing

There is no sovereign immunity from the Taking Clause since it is self-executing and automatically strips the government of sovereign immunity. This Court has recognized the "self-executing" character of the constitutional provision with respect to compensation . . . ." *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304 (1987) (citing *United States v. Clarke*, 445 U.S. 253, 257 (1980)), (quoting 6 P. Nichols, *Eminent Domain* § 25.41 (3d rev. ed. 1972)); *see also* Paul J. Heald & Michael L. Wells, *Remedies for the Misappropriation of Intellectual Property by State and Municipal Governments Before and After* Seminole Tribe*: The Eleventh Amendment and Other Immunity Doctrines*, 55 Wash. & Lee L. Rev. 849, 871-72 (1988) (Just Compensation Clause creates an exception to normal sovereign immunity rules); Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity and the Denationalization of Federal Law*, 31 Rutgers L.J. 691, 724 n.126 (2000) (Constitution provides direct remedy for takings in spite of sovereign immunity); and Grant, 91 Nw. U. L. Rev. at 201 (noting if remedy to compensation for taking is dictated by the Constitution itself, its availability cannot depend on the good graces of Congress.).

In *First English*, this Court explained that it had long recognized that claims for just compensation are grounded in the Constitution itself:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right was guaranteed by the Constitution.* The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. *The suits were thus founded upon the Constitution of the United States.*

482 U.S. at 315 (emphasis in original) (citing *Jacobs v. United States*, 290 U.S. 13 (1933)); *see also United States v. Clarke*, 445 U.S. 253, 257 (1980) (describing the Takings Clause as "self-executing").

Notably, the Solicitor General of the United States filed an amicus brief in *First English* zealously attacking the above proposition on the basis of sovereign immunity. The Solicitor's Argument was that the Fifth Amendment was not a remedial provision. This argument was firmly rejected by this Court.

> The Solicitor General urges that the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision. The [inverse condemnation] cases cited in the text, we think, refute the argument of the United States

> that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government." . . . Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking.

482 U.S. at 316 n.9.

Because the Just Compensation Clause is self-executing, the Constitution itself provides the requisite waiver of sovereign immunity. *See Hair v. United States*, 350 F.3d 1253, 1257 (Fed. Cir. 2003) ("It is true that sovereign immunity does not protect the government from a Fifth Amendment Takings claim because the constitutional mandate is "self-executing."); *see also Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1374-75 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001) (a self-executing clause of the constitution, such as the Takings Clause or the export clause, triggers the application of the Tucker Act's jurisdiction relating to claims founded under the constitution without the need to comply with other statutes); *Leistiko v. Secretary of Army*, 922 F. Supp. 66, 73 (N.D. Ohio 1996) ("The Just Compensation Clause, with its self-executing language, waives sovereign immunity because it can fairly be interpreted as mandating compensation by the government . . . .").

The constitutional rights of property owners to bring inverse condemnation actions such as the one in this case is summed up best as follows:

> [P]roperty owners enjoy the right to bring inverse condemnation actions not by the government's consent, but by constitutional command. The holding of *McElrath v. United States*—when a plaintiff avails himself of the "privilege" to sue the government, "he must do so subject to the conditions

> annexed by the government to the exercise of the privilege"—does not apply to suits for just compensation. It is constitutionally mandated that Congress open some court to hear claims against the United States founded upon the Just Compensation Clause; Congress cannot therefore require claimants who invoke the jurisdiction of such court to relinquish their constitutional rights.

Grant, 91 Nw. U. L. Rev. at 205.

The adoption of the Fifth Amendment by the Framers of the Constitution was an explicit waiver of sovereign immunity. The government cannot hide behind sovereign immunity to avoid payment of just compensation if a taking has occurred. If a taking has occurred, the Constitution unequivocally demands compensation.

II

SOVEREIGN IMMUNITY IS NOT A LEGITIMATE BASIS JUSTIFYING A STRICT STATUTE OF LIMITATIONS IN TAKINGS CASES

Because constitutional claims for just compensation are not subject to sovereign immunity, the Federal Circuit's sole reliance on sovereign immunity as the basis for its strict construction of the statute of limitations in 28 U.S.C. § 2501 as jurisdictional in this case cannot stand.

The Federal Circuit's decision rested entirely upon case law stating that "statute of limitations for causes of action against the United States, being conditions of the waiver of sovereign immunity, are jurisdictional in nature." *Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (en banc), *cert. denied*, 540 U.S. 1177 (2004); *see also Caguas Cent. Fed. Sav. Bank v. United States*, 215 F.3d 1304, 1310 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) ("In the Court of

Federal Claims, the statute of limitations is jurisdictional, because filing within the six-year period was a condition of the waiver of sovereign immunity in the Tucker Act, 28 U.S.C. § 1491(a)(1)."). However, none of the cases relied upon by the Federal Circuit (or the government in this case) involve takings claims under the Fifth Amendment. Thus, the issue of whether the government had conditioned the waiver of sovereign immunity on compliance with the applicable time deadlines was relevant in those previous decisions. In contrast, sovereign immunity has no bearing on claims brought under the Fifth Amendment. Thus, it should not be a basis for applying a strict construction of the statute of limitations in 28 U.S.C. § 2501.

In cases involving the Just Compensation Clause of the Fifth Amendment, 28 U.S.C. § 2501 does not create a jurisdictional condition when a takings claim is involved. It is merely a statute of limitations that can be waived by the parties as it was in this case by the government. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990) (statutes of limitations on suits against the government should be treated "in the same way" as statutes of limitations in private suits). As a statute of limitations, it should have been raised as a defense. *See, e.g.*, Rule of the Court of Federal Claims 8(c) (the statute of limitations is an affirmative defense).

> The raising of the statutory bar to a remedy does not, as such, deprive the court of jurisdiction to hear the cause in the first instance. Indeed, the court could not adjudicate the question of the proper application of the statute if it did not have subject matter jurisdiction over the claim.

Henke v. United States, 60 F.3d 795, 798 n.3 (Fed. Cir. 1995).

It is indisputable that the Court of Federal Claims had jurisdiction over the parties and the subject matter in this case since it involved a takings claim under the Fifth Amendment. *See Causby*, 328 U.S. at 267 ("If there is taking, the claim is

'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine."); *see also* 28 U.S.C. § 1491(a)(1) (providing the Court of Federal Claims with jurisdiction over takings claims brought against the United States).

Since the statute of limitations in Section 2501 is not a jurisdictional requirement in this case, the Federal Circuit erred by considering the issue *sua sponte*.

CONCLUSION

By holding that sovereign immunity considerations warrant a strict view of the statute of limitations for Petitioner's taking claim, the court below has wrongly implied that claims under the Fifth Amendment are subject to sovereign immunity. Amicus respectfully urges the Court to reject the faulty premise that sovereign immunity supports a strict statute of limitations for Tucker Act claims arising under the Fifth Amendment and reverse the judgment of the Federal Circuit.

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Respectfully submitted,

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